MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

July 29, 2011, through February 3, 2012

JOHN O. JUROSZEK
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SUPREME COURT

	Term Expires January 1 of
Chief Justice	
ROBERT P. YOUNG, Jr.	2019
Justices	
MICHAEL F. CAVANAGH	2015
MARILYN KELLY	2013
STEPHEN J. MARKMAN	2013
DIANE M. HATHAWAY	2017
MARY BETH KELLY	2019
BRIAN K. ZAHRA	2013

Commissioners

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SHARI M. OBERG, Deputy Chief Commissioner

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CHAD C. SCHMUCKER

Clerk: CORBIN R. DAVIS
Reporter of Decisions: JOHN O. JUROSZEK
Crier: DAVID G. PALAZZOLO

COURT OF APPEALS

	Term Expires January 1 of
Chief Judge	
WILLIAM B. MURPHY	2013
Chief Judge Pro Tem	
DAVID H. SAWYER	2017
Judges	
MARK J. CAVANAGH	2015
KATHLEEN JANSEN	2013
E. THOMAS FITZGERALD	2015
HENRY WILLIAM SAAD	2015
JOEL P. HOEKSTRA	2017
JANE E. MARKEY	2015
PETER D. O'CONNELL	2013
WILLIAM C. WHITBECK	2017
MICHAEL J. TALBOT	2015
KURTIS T. WILDER	2017
PATRICK M. METER	2015
DONALD S. OWENS	2017
KIRSTEN FRANK KELLY	2013
CHRISTOPHER M. MURRAY	2015
PAT M. DONOFRIO	2017
KAREN FORT HOOD	2015
STEPHEN L. BORRELLO	2013
DEBORAH A. SERVITTO	2013
JANE M. BECKERING	2013
ELIZABETH L. GLEICHER	2013
CYNTHIA DIANE STEPHENS	2017
MICHAEL J. KELLY	2015
DOUGLAS B. SHAPIRO	2013
AMY RONAYNE KRAUSE	2013

Chief Clerk/Research Director:
LARRY S. ROYSTER

CIRCUIT JUDGES

		Term Expires January 1 of
1.	MICHAEL R. SMITH	2015
2.	ALFRED M. BUTZBAUGH	2013
	JOHN E. DEWANE	2015
	JOHN M. DONAHUE	2017
	CHARLES T. LaSATA	2017
3.	DEBORAH ROSS ADAMS	2019
	DAVID J. ALLEN	2015
	WENDY M. BAXTER	2019
	ANNETTE J. BERRY	2019
	GREGORY D. BILL	2019
	SUSAN D. BORMAN	2015
	ULYSSES W. BOYKIN	2015
	MARGIE R. BRAXTON	2017
	MEGAN MAHER BRENNAN	2015
	JAMES A. CALLAHAN	2017
	MICHAEL J. CALLAHAN	2015
	JEROME C. CAVANAGH	2019
	ERIC WILLIAM CHOLACK	2017
	JAMES R. CHYLINSKI	2017
	ROBERT J. COLOMBO, Jr.	2019
	DAPHNE MEANS CURTIS	2015
	CHRISTOPHER D. DINGELL	2015
	GERSHWIN ALLEN DRAIN	2017
	PRENTIS EDWARDS	2013
	CHARLENE M. ELDER	2015
	VONDA R. EVANS	2015
	EDWARD EWELL, Jr.	2019
	PATRICIA SUSAN FRESARD	2017
	SHEILA ANN GIBSON	2017
	JOHN H. GILLIS, Jr.	2015
	DAVID ALAN GRONER	2017
	RICHARD B. HALLORAN, Jr.	2019
	AMY PATRICIA HATHAWAY	2019
	CYNTHIA GRAY HATHAWAY	2017

		Term Expires January 1 of
	MICHAEL M. HATHAWAY	2017
	SUSAN L. HUBBARD	2017
	MURIEL D. HUGHES	2017
	THOMAS EDWARD JACKSON	2013
	VERA MASSEY JONES	2015
	CONNIE MARIE KELLEY	2015
	TIMOTHY MICHAEL KENNY	2017
	ARTHUR J. LOMBARD	2015
	KATHLEEN I. MACDONALD	2017
	KATHLEEN M. McCARTHY	2019
	WADE H. McCREE	2015
	BRUCE U. MORROW	2017
	JOHN A. MURPHY	2017
	MARIA L. OXHOLM	2019
	LINDA V. PARKER	2019
	LYNNE A. PIERCE	2015
	LITA MASINI POPKE	2017
	DANIEL P. RYAN	2019
	MICHAEL F. SAPALA	2013
	RICHARD M. SKUTT	2015
	MARK T. SLAVENS	2017
	LESLIE KIM SMITH	2019
	VIRGIL C. SMITH	2019
	JEANNE STEMPIEN	2017
	CRAIG S. STRONG	2015
	BRIAN R. SULLIVAN	2017
	LAWRENCE S. TALON	2015
	DEBORAH A. THOMAS	2019
	CAROLE F. YOUNGBLOOD	2013
	ROBERT L. ZIOLKOWSKI	2015
4.	SUSAN E. BEEBE	2017
	RICHARD N. LaFLAMME	2017
	JOHN G. McBAIN, Jr.	2015
	THOMAS D. WILSON	2019
5.	AMY McDOWELL	2015
6.	JAMES M. ALEXANDER	2015
	MARTHA ANDERSON	2015
	LEO BOWMAN	2019
	MARY ELLEN BRENNAN	2017
	RAE LEE CHABOT	2017
	LISA ORTLIEB GORCYCA	2015
	NANCI J. GRANT	2015
	SHALINA D. KUMAR	2015

		Term Expires January 1 of
	DENISE LANGFORD-MORRIS	2019
	CHERYL A. MATTHEWS	2017
	RUDY J. NICHOLS	2015
	COLLEEN A. O'BRIEN	2017
	DANIEL PATRICK O'BRIEN	2017
	WENDY LYNN POTTS	2019
	EDWARD SOSNICK	2013
	MICHAEL D. WARREN, Jr.	2019
	JOAN E. YOUNG	2017
7.	DUNCAN M. BEAGLE	2017
	JOSEPH J. FARAH	2017
	JUDITH A. FULLERTON	2019
	JOHN A. GADOLA	2015
	ARCHIE L. HAYMAN	2019
	GEOFFREY L. NEITHERCUT	2019
	DAVID J. NEWBLATT	2017
	MICHAEL J. THEILE	2015
	RICHARD B. YUILLE	2015
8.	DAVID A. HOORT	2017
	SUZANNE KREEGER	2015
9.	GARY C. GIGUERE, Jr.	2015
	STEPHEN D. GORSALITZ	2017
	J. RICHARDSON JOHNSON	2017
	PAMELA L. LIGHTVOET	2019
	ALEXANDER C. LIPSEY	2017
10.	JANET M. BOES	2019
	FRED L. BORCHARD	2017
	DARNELL JACKSON	2019
	ROBERT L. KACZMAREK	2015
11.	WILLIAM W. CARMODY	2015
12.	CHARLES R. GOODMAN	2015
13.	THOMAS G. POWER	2017
	PHILIP E. RODGERS, Jr.	2015
14.	JAMES M. GRAVES, Jr.	2013
	TIMOTHY G. HICKS	2017
	WILLIAM C. MARIETTI	2017
	JOHN C. RUCK	2015
15.	PATRICK W. O'GRADY	2015
16.	JAMES M. BIERNAT, Sr.	2019
	RICHARD L. CARETTI	2017
	MARY A. CHRZANOWSKI	2017
	DIANE M. DRUZINSKI	2015
	JOHN C. FOSTER	2015
	PETER J. MACERONI	2015

		Term Expires January 1 of
	EDWARD A. SERVITTO, Jr.	2019
	MARK S. SWITALSKI	2019
	MATTHEW S. SWITALSKI	2015
	DAVID VIVIANO	2019
	TRACEY A. YOKICH	2019
17.	GEORGE S. BUTH	2017
	PAUL J. DENEFELD	2017
	KATHLEEN A. FEENEY	2015
	DONALD A. JOHNSTON, III	2019
	DENNIS B. LEIBER	2019
	JAMES ROBERT REDFORD	2017
	PAUL J. SULLIVAN	2015
	MARK A. TRUSOCK	2019
	CHRISTOPHER P. YATES	2019
	DANIEL V. ZEMAITIS	2015
18.	HARRY P. GILL	2017
	KENNETH W. SCHMIDT	2019
	JOSEPH K. SHEERAN	2015
19.	JAMES M. BATZER	2015
20.	KENT D. ENGLE	2017
	JON H. HULSING	2015
	EDWARD R. POST	2017
	JON VAN ALLSBURG	2019
21.	PAUL H. CHAMBERLAIN	2017
	MARK H. DUTHIE	2019
22.	ARCHIE CAMERON BROWN	2017
	TIMOTHY P. CONNORS	2019
	MELINDA MORRIS	2013
	DONALD E. SHELTON	2015
	DAVID S. SWARTZ	2015
23.	RONALD M. BERGERON	2015
	WILLIAM F. MYLES	2017
24.	DONALD A. TEEPLE	2015
25.	JENNIFER MAZZUCHI	2015
	THOMAS L. SOLKA	2017
26.	MICHAEL G. MACK	2015
27.	ANTHONY A. MONTON	2019
	TERRENCE R. THOMAS	2015
28.	WILLIAM M. FAGERMAN	2015
29.	MICHELLE M. RICK	2017
	RANDY L. TAHVONEN	2015
30.	ROSEMARIE ELIZABETH AQUILINA	2015
	LAURA BAIRD	2019

		Term Expires January 1 of
	CLINTON CANADY, III	2017
	WILLIAM E. COLLETTE	2015
	JOYCE DRAGANCHUK	2017
	JANELLE A. LAWLESS	2015
	PAULA J.M. MANDERFIELD	2013
31.	JAMES P. ADAIR	2013
	DANIEL J. KELLY	2015
	CYNTHIA A. LANE	2017
32.	ROY D. GOTHAM	2015
33.	RICHARD M. PAJTAS	2015
34.	MICHAEL J. BAUMGARTNER	2017
35.	GERALD D. LOSTRACCO	2015
36.	PAUL E. HAMRE	2015
37.	ALLEN L. GARBRECHT	2017
	JAMES C. KINGSLEY	2015
	STEPHEN B. MILLER	2017
	CONRAD J. SINDT	2019
38.	JOSEPH A. COSTELLO, JR.	2015
	MICHAEL W. LABEAU	2019
	MICHAEL A. WEIPERT	2017
39.	MARGARET MURRAY-SCHOLZE NOE	2015
	TIMOTHY P. PICKARD	2019
40.	MICHAEL P. HIGGINS	2015
	NICK O. HOLOWKA	2017
41.	MARY BROUILLETTE BARGLIND	2017
	RICHARD J. CELELLO	2015
42.	MICHAEL J. BEALE	2015
	JONATHAN E. LAUDERBACH	2013
43.	MICHAEL E. DODGE	2017
44.	MICHAEL P. HATTY	2019
	DAVID READER	2017
45.	PAUL E. STUTESMAN	2019
46.	JANET M. ALLEN	2011
	DENNIS F. MURPHY	2015
47.	STEPHEN T. DAVIS	2017
48.	MARGARET BAKKER	2017
	KEVIN W. CRONIN	2015
49.	SCOTT P. HILL-KENNEDY	2019
	RONALD C. NICHOLS	2015
50.	NICHOLAS J. LAMBROS	2013
51.	RICHARD I. COOPER	2015
52.	M. RICHARD KNOBLOCK	2015
53.	SCOTT LEE PAVLICH	2017

		Term Expires January 1 of
54.	PATRICK REED JOSLYN	2013[1]
55.	THOMAS R. EVANS	2015
	ROY G. MIENK	2019
56.	THOMAS S. EVELAND	2013
	CALVIN E. OSTERHAVEN	2015
57.	CHARLES W. JOHNSON	2019

[1] To January 31, 2012.

DISTRICT JUDGES

		Term Expires January 1 of
1.	MARK S. BRAUNLICH	2015
	TERRENCE P. BRONSON	2019
	JACK VITALE	2017
2A.	LAURA J. SCHAEDLER	2017
	JAMES E. SHERIDAN	2015
2B.	DONALD L. SANDERSON	2015
3A.	BRENT R. WEIGLE	2015
3B.	JEFFREY C. MIDDLETON	2015
	WILLIAM D. WELTY	2013
4.	STACEY A. RENTFROW	2015
5.	GARY J. BRUCE	2017
	ANGELA PASULA	2015
	SCOTT SCHOFIELD	2015
	STERLING R. SCHROCK	2019
	DENNIS M. WILEY	2017
7.	ARTHUR H. CLARKE, III	2015
	ROBERT T. HENTCHEL	2017
8-1.	ANNE E. BLATCHFORD	2019
	PAUL J. BRIDENSTINE	2019
	CAROL A. HUSUM	2017
8-2.	ROBERT C. KROPF	2015
8-3.	RICHARD A. SANTONI	2015
	VINCENT C. WESTRA	2017
10.	SAMUEL I. DURHAM, Jr.	2017
	JOHN A. HALLACY	2015
	JOHN R. HOLMES	2019
	FRANKLIN K. LINE, Jr.	2015
12.	JOSEPH S. FILIP	2017
	JAMES M. JUSTIN	2013
	MICHAEL J. KLAEREN	2015
	R. DARRYL MAZUR	2015
14A.	RICHARD E. CONLIN	2015
	J. CEDRIC SIMPSON	2019
	KIRK W. TABBEY	2017
14B.	CHARLES POPE	2015

		Term Expires January 1 of
15.	JULIE CREAL	2013[1]
	CHRISTOPHER S. EASTHOPE	2015
	ELIZABETH POLLARD HINES	2017
16.	SEAN P. KAVANAGH	2015
	KATHLEEN J. McCANN	2019
17.	KAREN KHALIL	2017
	CHARLOTTE L. WIRTH	2015
18.	SANDRA A. CICIRELLI	2019
	MARK A. McCONNELL	2015
19.	WILLIAM C. HULTGREN	2017
	MARK W. SOMERS	2015
	RICHARD WYGONIK	2013
20.	MARK J. PLAWECKI	2015
	DAVID TURFE	2019
21.	RICHARD L. HAMMER, Jr.	2015
22.	SYLVIA A. JAMES	2013
23.	GENO SALOMONE	2019
	WILLIAM J. SUTHERLAND	2015
24.	JOHN T. COURTRIGHT	2015
	RICHARD A. PAGE	2017
25.	DAVID A. BAJOREK	2015
	DAVID J. ZELENAK	2017
26.	MICHAEL F. CIUNGAN	2015
27.	RANDY L. KALMBACH	2019
28.	JAMES A. KANDREVAS	2015
29.	LAURA REDMOND MACK	2019
30.	BRIGETTE R. OFFICER	2017
31.	PAUL J. PARUK	2015
32A.	ROGER J. La ROSE	2015
33.	JENNIFER COLEMAN HESSON	2017
	JAMES KURT KERSTEN	2015
	MICHAEL K. McNALLY	2019
34.	TINA BROOKS GREEN	2019
	BRIAN A. OAKLEY	2017
	DAVID M. PARROTT	2015
35.	MICHAEL J. GEROU	2017
	RONALD W. LOWE	2019
	JAMES A. PLAKAS	2015
36.	LYDIA NANCE ADAMS	2017
	ROBERTA C. ARCHER	2019
	MARYLIN E. ATKINS	2013
	JOSEPH N. BALTIMORE	2015
	NANCY McCAUGHAN BLOUNT	2015
	IZETTA F. BRIGHT	2017
	ESTHER LYNISE BRYANT-WEEKES	2015
	RUTH C. CARTER	2017

[1] To January 12, 2012.

		Term Expires January 1 of
	DONALD COLEMAN	2019
	PRENTIS EDWARDS, Jr.	2019
	DEBORAH GERALDINE FORD	2017
	RUTH ANN GARRETT	2019
	RONALD GILES	2015
	KATHERINE HANSEN	2017
	SHANNON A. HOLMES	2015
	PAULA G. HUMPHRIES	2017
	PATRICIA L. JEFFERSON	2015
	VANESA F. JONES-BRADLEY	2013
	KENNETH J. KING	2015
	DEBORAH L. LANGSTON	2019
	WILLIE G. LIPSCOMB, Jr.	2015
	LEONIA J. LLOYD	2017
	MIRIAM B. MARTIN-CLARK	2017
	WILLIAM McCONICO	2019
	DONNA R. MILHOUSE	2019
	B. PENNIE MILLENDER	2017
	CYLENTHIA L. MILLER	2017
	KEVIN F. ROBBINS	2019
	DAVID S. ROBINSON, Jr.	2019
	BRENDA KAREN SANDERS	2015
	MICHAEL E. WAGNER	2015
37.	JOHN M. CHMURA	2019
	JENNIFER FAUNCE	2015
	DAWNN M. GRUENBURG	2017
	MATTHEW P. SABAUGH	2013
38.	CARL F. GERDS III	2015
39.	JOSEPH F. BOEDEKER	2015
	MARCO A. SANTIA	2019
	CATHERINE B. STEENLAND	2017
40.	MARK A. FRATARCANGELI	2019
	JOSEPH CRAIGEN OSTER	2015
41A.	MICHAEL S. MACERONI	2015
	DOUGLAS P. SHEPHERD	2019
	STEPHEN S. SIERAWSKI	2017
	KIMBERLEY ANNE WIEGAND	2019
41B.	LINDA DAVIS	2015
	CARRIE LYNN FUCA	2017
	SEBASTIAN LUCIDO	2019
42-1.	DENIS R. LeDUC	2015
42-2.	WILLIAM H. HACKELL III	2019
43.	CHARLES G. GOEDERT	2015
	KEITH P. HUNT	2019
	JOSEPH LONGO	2017
44.	TERRENCE H. BRENNAN	2015
	DANIEL SAWICKI	2013

		Term Expires January 1 of
45A.	JAMES L. WITTENBERG	2015
45B.	MICHELLE FRIEDMAN APPEL	2015
	DAVID M. GUBOW	2015
46.	SHEILA R. JOHNSON	2015
	SUSAN M. MOISEEV	2013
	WILLIAM J. RICHARDS	2017
47.	JAMES BRADY	2015
	MARLA E. PARKER	2017
48.	MARC BARRON	2017
	DIANE D'AGOSTINI	2019
	KIMBERLY SMALL	2015
50.	RONDA FOWLKES GROSS	2019
	MICHAEL C. MARTINEZ	2015
	PRESTON G. THOMAS	2017
	CYNTHIA THOMAS WALKER	2015
51.	JODI R. DEBBRECHT SWITALSKI	2019
	RICHARD D. KUHN, Jr.	2015
52-1.	ROBERT BONDY	2019
	BRIAN W. MacKENZIE	2015
	DENNIS N. POWERS	2017
52-2.	JOSEPH G. FABRIZIO	2015
	KELLEY RENAE KOSTIN	2017
52-3.	LISA L. ASADOORIAN	2019
	NANCY TOLWIN CARNIAK	2017
	JULIE A. NICHOLSON	2015
52-4.	WILLIAM E. BOLLE	2015
	DENNIS C. DRURY	2013
	KIRSTEN NIELSEN HARTIG	2017
53.	THERESA M. BRENNAN	2015
	L. SUZANNE GEDDIS	2017
	CAROL SUE READER	2019
54A.	LOUISE ALDERSON	2017
	PATRICK F. CHERRY	2015
	FRANK J. DeLUCA	2019
	CHARLES F. FILICE	2015
54B.	RICHARD D. BALL	2017
	DAVID L. JORDON	2013
55.	DONALD L. ALLEN	2017
	THOMAS P. BOYD	2015
56A.	HARVEY J. HOFFMAN	2017
	JULIE H. REINCKE	2015
56B.	MICHAEL LEE SCHIPPER	2019
57.	WILLIAM A. BAILLARGEON	2019
	JOSEPH S. SKOCELAS	2015
58.	SUSAN A. JONAS	2015
	RICHARD J. KLOOTE	2013
	BRADLEY S. KNOLL	2015

		Term Expires January 1 of
	KENNETH D. POST	2017
59.	PETER P. VERSLUIS	2017
60.	HAROLD F. CLOSZ, III	2015
	MARIA LADAS HOOPES	2015
	MICHAEL JEFFREY NOLAN	2019
	ANDREW WIERENGO	2017
61.	DAVID J. BUTER	2015
	J. MICHAEL CHRISTENSEN	2017
	JEANINE NEMESI LaVILLE	2019
	BEN H. LOGAN, II	2019
	DONALD H. PASSENGER	2017
	KIMBERLY A. SCHAEFER	2015
62A.	PABLO CORTES	2015
	STEVEN M. TIMMERS	2019
62B.	WILLIAM G. KELLY	2015
63-1.	STEVEN R. SERVAAS	2015
63-2.	SARA J. SMOLENSKI	2015
64A.	RAYMOND P. VOET	2015
64B.	DONALD R. HEMINGSEN	2015
65A.	RICHARD D. WELLS	2015
65B.	STEWART D. McDONALD	2015
66.	WARD L. CLARKSON	2019
	TERRANCE P. DIGNAN	2015
67-1.	DAVID J. GOGGINS	2015
67-2.	JOHN L. CONOVER	2015
	MARK W. LATCHANA	2017
67-3.	LARRY STECCO	2015
67-4.	MARK C. McCABE	2015
	CHRISTOPHER ODETTE	2019
68.	TRACY L. COLLIER-NIX	2015
	WILLIAM H. CRAWFORD, II	2019
	MARY CATHERINE DOWD	2017
	HERMAN MARABLE, Jr.	2019
	NATHANIEL C. PERRY, III	2015
70-1.	TERRY L. CLARK	2019
	M. RANDALL JURRENS	2017
	M. T. THOMPSON, Jr.	2015
70-2.	CHRISTOPHER S. BOYD	2017
	ALFRED T. FRANK	2015
	KYLE HIGGS TARRANT	2019
71A.	LAURA CHEGER BARNARD	2015
	JOHN T. CONNOLLY	2013
71B.	KIM DAVID GLASPIE	2015
72.	MICHAEL L. HULEWICZ	2017
	JOHN D. MONAGHAN	2019
	CYNTHIA SIEMEN PLATZER	2015
73A.	GREGORY S. ROSS	2015
73B.	DAVID B. HERRINGTON	2015

		Term Expires January 1 of
74.	MARK E. JANER	2015
	TIMOTHY J. KELLY	2013
	DAWN A. KILDA	2015
75.	STEVEN CARRAS	2017
	JOHN HENRY HART	2015
76.	WILLIAM R. RUSH	2015
77.	SUSAN H. GRANT	2015
78.	H. KEVIN DRAKE	2015
79.	PETER J. WADEL	2015
80.	JOSHUA M. FARRELL	2015
81.	ALLEN C. YENIOR	2015
82.	RICHARD E. NOBLE	2015
83.	DANIEL L. SUTTON	2015
84.	DAVID A. HOGG	2015
85.	BRENT V. DANIELSON	2015
86.	MICHAEL J. HALEY	2015
	THOMAS J. PHILLIPS	2013
	MICHAEL STEPKA	2017
87.	PATRICIA A. MORSE	2015
88.	THEODORE O. JOHNSON	2015
89.	MARIA L. BARTON	2015
90.	RICHARD W. MAY	2015
91.	ELIZABETH BIOLETTE CHURCH	2015
92.	BETH GIBSON	2015
93.	MARK E. LUOMA	2009
94.	GLENN A. PEARSON	2015
95A.	JEFFREY G. BARSTOW	2015
95B.	CHRISTOPHER S. NINOMIYA	2015
96.	DENNIS H. GIRARD	2017
	ROGER W. KANGAS	2015
97.	MARK A. WISTI	2015
98.	ANDERS B. TINGSTAD, Jr.	2015

MUNICIPAL JUDGES

	Term Expires January 1 of
RUSSELL F. ETHRIDGE	2016
CARL F. JARBOE	2014
MATTHEW R. RUMORA	2014

PROBATE JUDGES

County		Term Expires January 1 of
Alcona	LAURA A. FRAWLEY	2019
Alger/Schoolcraft	CHARLES C. NEBEL	2019
Allegan	MICHAEL L. BUCK	2019
Alpena	THOMAS J. LaCROSS	2019
Antrim	NORMAN R. HAYES	2019
Arenac	RICHARD E. VOLLBACH, Jr.	2019
Baraga	TIMOTHY S. BRENNAN	2019
Barry	WILLIAM M. DOHERTY	2013
Bay	KAREN TIGHE	2013
Benzie	NANCY A. KIDA	2013
Berrien	MABEL JOHNSON MAYFIELD	2015
Berrien	THOMAS E. NELSON	2019
Branch	FREDERICK L. WOOD	2013
Calhoun	MICHAEL L. JACONETTE	2017
Cass	SUSAN L. DOBRICH	2019
Cheboygan	ROBERT JOHN BUTTS	2019
Chippewa	LOWELL R. ULRICH	2013
Clare/Gladwin	THOMAS P. McLAUGHLIN	2019
Clinton	LISA SULLIVAN	2019
Crawford	MONTE BURMEISTER	2019
Delta	ROBERT E. GOEBEL, Jr.	2019
Dickinson	THOMAS D. SLAGLE	2019
Eaton	THOMAS K. BYERLEY	2019
Emmet/Charlevoix	FREDERICK R. MULHAUSER	2019
Genesee	JENNIE E. BARKEY	2015
Genesee	F. KAY BEHM	2019
Gogebic	JOEL L. MASSIE	2019
Grand Traverse	DAVID L. STOWE	2013
Gratiot	JACK T. ARNOLD	2013
Hillsdale	MICHAEL E. NYE	2013
Houghton	FRASER T. STROME	2019
Huron	DAVID L. CLABUESCH	2019
Ingham	R. GEORGE ECONOMY	2019

Ingham	RICHARD JOSEPH GARCIA	2015
Ionia	ROBERT SYKES, JR.	2019
Iosco	JOHN D. HAMILTON	2013
Iron	C. JOSEPH SCHWEDLER	2019
Isabella	WILLIAM T. ERVIN	2019
Jackson	DIANE M. RAPPLEYE	2019
Kalamazoo	CURTIS J. BELL, JR.	2019
Kalamazoo	PATRICIA N. CONLON	2015
Kalamazoo	DONALD R. HALSTEAD	2017
Kalkaska	LYNNE MARIE BUDAY	2019
Kent	NANARUTH H. CARPENTER	2017
Kent	PATRICIA D. GARDNER	2019
Kent	G. PATRICK HILLARY	2019
Kent	DAVID M. MURKOWSKI	2015
Kent	GEORGE JAY QUIST	2017
Keweenaw	JAMES G. JAASKELAINEN	2019
Lake	MARK S. WICKENS	2019
Lapeer	JUSTUS C. SCOTT	2019
Leelanau	LARRY J. NELSON	2019
Lenawee	GREGG P. IDDINGS	2019
Livingston	CAROL HACKETT GARAGIOLA	2013
Luce/Mackinac	W. CLAYTON GRAHAM	2019
Macomb	KATHRYN A. GEORGE	2015
Macomb	PAMELA GILBERT O'SULLIVAN	2013
Manistee	THOMAS N. BRUNNER	2019
Marquette	MICHAEL J. ANDEREGG	2013
Mason	MARK D. RAVEN	2013
Mecosta/Osceola	MARCO S. MENEZES	2019
Menominee	WILLIAM A. HUPY	2019
Midland	DORENE S. ALLEN	2019
Missaukee	CHARLES R. PARSONS	2019
Monroe	JOHN A. HOHMAN, JR.	2019
Montcalm	CHARLES W. SIMON, III	2019
Montmorency	JOHN E. FITZGERALD	2013
Muskegon	NEIL G. MULLALLY	2017
Muskegon	GREGORY C. PITTMAN	2019
Newaygo	GRAYDON W. DIMKOFF	2019
Oakland	LINDA S. HALLMARK	2019
Oakland	DANIEL A. O'BRIEN	2015
Oakland	ELIZABETH M. PEZZETTI	2017
Oakland	KATHLEEN A. RYAN	2017
Oceana	BRADLEY G. LAMBRIX	2019
Ogemaw	SHANA A. LAMBOURN	2019
Ontonagon	JANIS M. BURGESS	2019
Oscoda	KATHRYN JOAN ROOT	2019

Otsego	MICHAEL K. COOPER	2019
Ottawa	MARK A. FEYEN	2019
Presque Isle	DONALD J. McLENNAN	2019
Roscommon	DOUGLAS C. DOSSON	2019
Saginaw	FAYE M. HARRISON	2015
Saginaw	PATRICK J. McGRAW	2019
St. Clair	ELWOOD L. BROWN	2015
St. Clair	JOHN TOMLINSON	2019
St. Joseph	THOMAS E. SHUMAKER	2013
Sanilac	R. TERRY MALTBY	2013
Sanilac	GREGORY S. ROSS	2015
Shiawassee	JAMES R. CLATTERBAUGH	2013
Tuscola	W. WALLACE KENT, JR.	2013
Van Buren	FRANK D. WILLIS	2019
Washtenaw	NANCY CORNELIA WHEELER	2015
Washtenaw	DARLENE A. O'BRIEN	2019
Wayne	JUNE E. BLACKWELL-HATCHER	2019
Wayne	FREDDIE G. BURTON, JR.	2019
Wayne	JUDY A. HARTSFIELD	2015
Wayne	MILTON L. MACK, JR.	2017
Wayne	CATHIE B. MAHER	2017
Wayne	MARTIN T. MAHER	2015
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ADMINISTRATIVE ORDER No. 2011-3

CASEFLOW MANAGEMENT GUIDELINES

RESCISSION OF ADMINISTRATIVE ORDER NO. 2003-7

Entered August 17, 2011, effective September 1, 2011 (rescinding Administrative Order No. 2003-7, entered December 2, 2003, at 469 Mich cxx) (File No. 2010-08)—REPORTER.

On order of the Court, notice of the proposed changes and an opportunity for comment in writing and at a public hearing having been provided, and consideration having been given to the comments received, Administrative Order No. 2003-7 is rescinded and the following administrative order is adopted, effective September 1, 2011.

The management of the flow of cases in the trial court is the responsibility of the judiciary. In carrying out that responsibility, the judiciary must balance the rights and interests of individual litigants, the limited resources of the judicial branch and other participants in the justice system, and the interests of the citizens of this state in having an effective, fair, and efficient system of justice.

Accordingly, on order of the Court,

A. The State Court Administrator is directed, within available resources, to:

1. assist trial courts in implementing caseflow management plans that incorporate case processing time guidelines established pursuant to this order;

2 .gather information from trial courts on compliance with caseflow management guidelines; and

3. assess the effectiveness of caseflow management plans in achieving the guidelines established by this order.

B. Trial courts are directed to:

1. maintain current caseflow management plans consistent with case processing time guidelines established in this order, and in cooperation with the State Court Administrative Office;

2. report to the State Court Administrative Office caseflow management statistics and other caseflow management data required by that office; and

3. cooperate with the State Court Administrative Office in assessing caseflow management plans implemented pursuant to this order.

On further order of the Court, the following time guidelines for case processing are provided as goals for the administration of court caseloads. These are only guidelines and are not intended to supersede procedural requirements in court rules or statutes for specific cases, or to supersede reporting requirements in court rules or statutes. The trial courts shall not dismiss cases for the sole reason that the case is likely to exceed the guideline. In addition, these guidelines do not supplant judicial discretion if, for good cause, a specific case of any type requires a time line that extends beyond the maximum permitted under these guidelines.

Note: The phrase "adjudicated" refers to the date a case is reported in Part 2 of the caseload report forms and instructions. Aging of a case is suspended for the

time a case is inactive as defined in Parts 2 and 4 of the caseload report forms and instructions. Refer to these specific definitions for details.

Matters Submitted to the Judge. Matters under submission to a judge or judicial officer should be promptly determined. Short deadlines should be set for presentation of briefs and affidavits and or production of transcripts. Decisions, when possible, should be made from the bench or within a few days of submission; otherwise a decision should be rendered no later than 35 days after submission.

Probate Court Guidelines.

1. *Estate, Trust, Guardianship, and Conservatorship Proceedings.* 75% of all contested matters should be adjudicated within 182 days from the date of the filing of objection and 100% within 364 days.

2. *Mental Illness Proceedings; Judicial Admission Proceedings*. 90% of all petitions should be adjudicated within 14 days from the date of filing and 100% within 28 days.

3. *Civil Proceedings.* 75% of all cases should be adjudicated within 364 days from the date of case filing and 100% within 728 days.

District Court Guidelines.

1. *Civil Proceedings.*

a. General Civil. 90% of all general civil and miscellaneous civil cases should be adjudicated within 273 days from the date of case filing and 100% within 455 days.

b. Summary Civil. 100% of all small claims, landlord/tenant, and land contract actions should be adjudicated within 126 days from the date of case filing

except, in those cases where a jury is demanded, actions should be adjudicated within 154 days from the date of case filing.

2. *Felony, Misdemeanor, and Extradition Detainer Proceedings.*

a. Misdemeanor. 90% of all statute and ordinance misdemeanor cases, including misdemeanor drunk driving and misdemeanor traffic, should be adjudicated within 63 days from the date of first appearance and 100% within 126 days.

b. Felony and Extradition/Detainer. 80% of all preliminary examinations in felony, felony drunk driving, felony traffic, and extradition/detainer cases should be concluded within 14 days of arraignment and 100% within 28 days.

3. *Civil Infraction Proceedings.* 90% of all civil infraction cases, including traffic, nontraffic, and parking cases, should be adjudicated within 35 days from the date of filing and 100% within 84 days.

Circuit Court Guidelines.

1. *Civil Proceedings.* 75% of all cases should be adjudicated within 364 days from the date of case filing and 100% within 728 days.

2. *Domestic Relations Proceedings.*

a. Divorce Without Children. 90% of all divorce cases without children should be adjudicated within 182 days from the date of case filing and 100% within 364 days.

b . Divorce With Children. 90% of all divorce cases with children should be adjudicated within 301 days from the date of case filing and 100% within 364 days.

c. Paternity. 90% of all paternity cases should be adjudicated within 147 days from the date of case filing and 100% within 238 days.

d. Responding Interstate Establishment. 90% of all incoming interstate actions to establish support should be adjudicated within 147 days from the date of case filing and 100% within 238 days.

e. Child Custody Issues, Other Support, and Other Domestic Relations Matters. 90% of all child custody, other support, and other domestic relations issues not listed above should be adjudicated within 147 days from the date of case filing and 100% within 238 days.

3. *Delinquency Proceedings*. Where a minor is being detained or is held in court custody, 90% of all original petitions or complaints should have adjudication and disposition completed within 84 days from the authorization of the petition and 100% within 98 days. Where a minor is not being detained or held in court custody, 75% of all original petitions or complaints should have adjudication and disposition completed within 119 days from the authorization of the petition and 100% within 210 days.

4. *Child Protective Proceedings*. Where a child is in out-of-home placement (foster care), 90% of all original petitions should have adjudication and disposition completed within 84 days from the authorization of the petition and 100% within 98 days. Where a child is not in out-of-home placement (foster care), 75% of all original petitions should have adjudication and disposition within 119 days from the authorization of the petition and 100% within 210 days.

5. *Designated Proceedings*. 90% of all original petitions should be adjudicated within 154 days from the designation date and 100% within 301 days. Minors held in custody should be afforded priority for trial.

6. *Juvenile Traffic and Ordinance Proceedings*. 90% of all citations should have adjudication and disposition completed within 63 days from the date of first appearance and 100% within 126 days.

7. *Adoption Proceedings.*

a. Petitions for Adoption. 90% of all petitions for adoption should be finalized or otherwise concluded within 287 days from the date of filing and 100% within 364 days.

b. Petitions to Rescind Adoption. 100% of all petitions to rescind adoption should be adjudicated within 91 days from the date of filing.

8. *Miscellaneous Family Proceedings.*

a. Name Change. 100% of all petitions should be adjudicated within 126 days from the date of filing.

b. Safe Delivery. 100% of all petitions should be adjudicated within 273 days from the date of filing.

c. Personal Protection. 100% of all petitions filed ex parte should be adjudicated within 24 hours of filing. 90% of all petitions not filed ex parte should be adjudicated within 14 days from the date of filing and 100% within 21 days.

d. Emancipation of Minors. 100% of all petitions should be adjudicated within 91 days from the date of filing.

e. Infectious Diseases. 100% of all petitions should be adjudicated within 91 days from the date of filing.

f. Parental Waiver. 100% of all petitions should be adjudicated within 5 days from the date of filing.

9. *Ancillary Proceedings.*

a. Guardianship and Conservatorship Proceedings. 75% of all contested matters should be adjudicated within 182 days from the date of filing and 100% within 364 days.

b. Mental Illness Proceedings; Judicial Admission. 90% of all petitions should be adjudicated within 14 days from the date of filing and 100% within 28 days.

10. *Criminal Proceedings*. 90% of all felony cases should be adjudicated within 91 days from the date of entry of the order binding the defendant over to the circuit court; 98% within 154 days; and 100% within 301 days. Incarcerated persons should be afforded priority for trial.

With SCAO approval, circuit courts may establish by local administrative order an alternative guideline for criminal proceedings that would provide that 90% of all felony cases should be adjudicated within 154 days from the date of entry of the order binding the defendant over to the circuit court and 100% within 301 days. Incarcerated persons should be afforded priority for trial. Courts requesting the alternative guideline must give the sheriff the opportunity to comment on the proposed order.

11. *Appellate, Administrative Review, and Extraordinary Writ Proceedings*.

a. Appeals from Courts of Limited Jurisdiction. 100% of all appeals to circuit court from courts of limited jurisdiction should be adjudicated within 182 days from the filing of the claim of appeal.

b. Appeals from Administrative Agencies. 100% of all appeals to the circuit court from administrative agencies should be adjudicated within 182 days from the filing of the claim of appeal.

c. Extraordinary Writs. 98% of all extraordinary writ requests should be adjudicated within 35 days from the date of filing and 100% within 91 days.

Staff Comment: The Court has adopted this administrative order to update the guidelines that were contained in Administrative Order No. 2003-7, which is rescinded by this order.

The staff comment is not an authoritative construction of the Court.

MARY BETH KELLY, J. (*concurring*). I write separately to explain that I voted to adopt the modification to the

criminal caseflow management guidelines in light of my belief that the modification will continue to prevent pretrial jail overcrowding. The order permits circuit courts to request local guidelines that allow for the adjudication of 90 percent of all felony cases within 154 days, as opposed to 91 days, contingent on approval by the State Court Administrative Office (SCAO). The order provides local sheriffs an opportunity to object to a circuit court's request to adopt the alternative extended guidelines. I believe that objections by sheriffs, based on verifiable jail overcrowding concerns, will function to preclude the SCAO from approving a request for alternative guidelines in large urban counties, like Wayne County, in which jail overcrowding has historically been a problem. Thus, the order furthers the purpose of effectively managing the jail population and maintaining public safety, while also giving courts in less populous regions more freedom to efficiently manage their criminal dockets.

MARILYN KELLY, J. (*dissenting*). Although I embrace the guidelines' underlying concept that the judiciary is responsible for managing the efficient flow of cases, I did not vote for the updated Caseflow Management Guidelines. It is my belief that they contain several deficiencies that should be and have not been corrected.

First, the Court's order makes clear that these are "only guidelines." They are not standards. But judges who are unable to meet them are subject to referral to the Judicial Tenure Commission. Some have been referred. That considered, I question whether the guidelines have not in fact become standards. If so, the Court should recognize them as such and no longer refer to them as guidelines. If not, failure to meet the guidelines' time lines should not be grounds for punitive action against judges.

Second, the Court has been made aware that some family law judges have put some divorce matters not resolvable within the guidelines' time lines into alternate dispute resolution and administratively closed the files. Such cases may actually remain unresolved long beyond the guidelines' time lines. However, they appear on statistical reports as completed as of the date the judge refers them. Hence, they escape the guidelines. Considering this, two things should occur: (1) the guidelines should be adjusted so that domestic relations cases can reasonably be resolved within the guidelines time lines, and (2) the Court should require that such cases not be shown as completed in caseflow management statistics until any alternate dispute resolution involving them has been completed and the court has actually finalized them.

HATHAWAY, J. (*dissenting*). Like Justice MARILYN KELLY, I embrace the guidelines' underlying concept that the judiciary is responsible for managing the efficient flow of cases. However, I also cannot support the updated Caseflow Management Guidelines because they contain deficiencies. I agree with the Michigan Judges Association that these are merely guidelines and that trial court compliance data gathered by the State Court Administrator should not be used as the basis for disciplinary action against a judge.

ADMINISTRATIVE ORDER No. 2011-4

E-FILING PILOT PROJECT IN THE 20TH CIRCUIT COURT, THE OTTAWA COUNTY PROBATE COURT, AND THE 58TH DISTRICT COURT (OTTAWA COUNTY)

Entered September 22, 2011 (File No. 2002-37)—REPORTER.

On order of the Court, the 20th Circuit Court, the Ottawa County Probate Court, and the 58th District Court (hereafter Ottawa County or participating courts) are authorized to implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin October 1, 2011, or as soon thereafter as is possible, and shall remain in effect until December 31, 2016, or further order of this Court. The participating courts are aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic filing rules during the pendency of Ottawa County's Electronic Document Filing Pilot Project, the participating courts will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The participating courts will track the participation and effectiveness of this pilot program and shall report to and provide relevant information as requested by the State Court Administrative Office.

1. Construction

The purpose of the pilot program is to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot program. The participating courts may exercise discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing documents during the pilot program, the Michigan Rules of Court govern all other aspects of the cases involved in the pilot project.

2. Definitions

a. "Clerk" means the Ottawa County Clerk and clerks of the participating courts.

b. "E-Filing" means any court pleading, motion, brief, response, list, order, judgment, notice, or other document filed electronically pursuant to the pilot program.

c. "LAO" means all local administrative orders governing the participating courts.

d. "MCR" means the Michigan Court Rules.

e. "Pilot program" means the e-filing initiative of the participating courts, the County Clerk, and the Ottawa County Information Technology Department in conjunction with ImageSoft, Inc., and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents. The 20th Circuit pilot program will begin testing with civil case types ND, NF, NH, NI, NM, NO, NP, NS, NZ, CB, CC, CD, CE, CF, CH, CK, CL, CP, CR, CZ, PC, PD, PR, PS, PZ and domestic relations case types DC, DM, DO, DP, DS, DZ, UD, UE, UF, UI, UM, UN, UT,

UW; the Ottawa County Probate Court will begin testing with civil case type CZ; and the 58th District Court will begin testing with general civil case type GC.

f. "Technical malfunction" means any hardware, software, or other malfunction that prevents a user from timely filing a complete e-filing or sending or receiving service of an e-filing.

g. "Web-based portal" means a website provided by ImageSoft where electronic filings may be submitted and delivered to the participating courts' OnBase workflow.

3. Participation in the Pilot Program

a. Participation in Ottawa County's pilot program is elective for all case types identified in Section 2.e., above. Participation may be initiated with new case filings or existing case files. At the discretion of the judge, participation may also include postdisposition proceedings in qualifying case types.

b. This is a voluntary e-filing project; however, once a case is designated as part of the e-filing project, it is presumed that all further documents will be filed electronically. Ottawa County recognizes that circumstances may arise preventing one from e-filing. To ensure all parties retain access to the participating courts, parties that demonstrate good cause will be permitted to file documents with the clerk, who will then file the documents electronically. Among the factors the participating courts will consider in determining whether good cause exists to excuse a party from e-filing is a party's access to the Internet.

4. E-filings Submission, Acceptance and Time of Service with the Court; Signature

a. In an effort to facilitate uniform service within the scope of this project, the participating courts strongly recommend electronic service.

b. Program participants must submit e-filings pursuant to these rules and the pilot program's technical requirements. The clerk may, in accordance with MCR 8.119(C) reject documents submitted for filing that do not comply with MCR 2.113(C)(1), are not accompanied by the proper fees, clearly violate Administrative Order No. 2006-2 (Privacy Policy), do not conform to the requirements of this pilot project, or are otherwise submitted in violation of a statute, MCR, LAO, or program rules.

c. E-filings may be submitted to the participating courts at any time, but shall only be reviewed and accepted for filing by the clerk's office during the normal business hours of 8 a.m. to 5 p.m. E-filings submitted after business hours shall be deemed filed on the business day the e-filing is accepted (usually the next business day). The clerk shall process electronic submissions on a first-in, first-out basis.

d. E-filings shall be treated as if they were hand-delivered to the participating courts for all purposes under statute, MCR, and LAO.

e. A pleading, document, or instrument e-filed or electronically served under this order shall be deemed to have been signed by the judge, court clerk, attorney, party, or declarant.

i. Signatures submitted electronically shall use the following form: /*s*/ *John L. Smith*.

ii. A document that requires a signature under the penalty of perjury is deemed signed by the declarant if, before filing, the declarant has signed a printed form of the document.

iii. An e-filed document that requires a signature of a notary public is deemed signed by the notary public if, before filing, the notary public has signed a printed form of the document.

f. The original of a sworn or verified document that is an e-filing (e.g., a verified pleading) or part of an e-filing (e.g., an affidavit, notarization, or bill of costs) must be maintained by the filing attorney and made available upon reasonable request of the participating courts, the signatory, or opposing party.

g. Proposed orders shall be submitted to the participating courts in accordance with the provisions of the pilot program. The participating courts and the clerk shall exchange the documents for review and signature pursuant to MCR 2.602(B).

h. By electronically filing the document, the electronic filer affirms compliance with these rules.

5. Time for Service and Filing of Pleadings, Documents, and Motions; Judge's Copies, Hearings on Motions; Fees

a. All times for filing and serving e-filings shall be governed by the applicable statute, MCR, and LAO as if the e-filings were hand-delivered.

b. The electronic submission of a motion and brief through this pilot program satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). Upon request by the participating courts, the filing party shall promptly provide a traditional judge's copy to chambers.

c. Applicable fees, including e-filing fees and service fees, shall be paid electronically through procedures established by the clerk's office at the same time and in the same amount as required by statute, MCR, or LAO.

i. Each e-filing is subject to the following e-filing fees:

1. EFO (e-filing only)	$4.00
2. EFS (e-filing with service)	$7.00
3. SO (service only)	$4.00

d. Users who use credit cards for payment are also responsible for a 3% user fee to reimburse the participating courts for credit card transaction costs.

6. Service

a. All parties shall provide the participating courts and opposing parties with one e-mail address with the functionality required for the pilot program. All service shall originate from and be perfected upon this e-mail address.

b. Alternatively, all parties shall register their e-mail addresses within the web-based portal and all documents filed within the web-based portal relating to the case will be served to the registered e-mail address.

c. Unless otherwise agreed to by the participating courts and the parties, all e-filings must be served electronically to the e-mail addresses of all parties. The subject matter line for the transmittal of the document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

d. The parties and the participating courts may agree that, instead of e-mail service, e-filings may be served to the parties (but not the participating courts) by facsimile or by traditional means. For those choosing to accept facsimile service:

i. the parties shall provide the participating courts and the opposing parties with one facsimile number with appropriate functionality,

ii. the facsimile number shall serve as the number to which service may be made,

iii. the sender of the facsimile should obtain a confirmation delivery, and

iv .parties shall comply with the requirements of MCR 2.406 on the use of facsimile communication equipment.

e. Proof of service shall be submitted to the participating courts according to MCR 2.107(D) and this order.

7. Format and Form of E-filing Service

a. A party may only e-file documents for one case in each transaction.

b. All e-filings shall comply with MCR 1.109 and the technical requirements of the participating courts' vendor.

c. Any exhibit or attachment that is part of an e-filing must be clearly designated and identified as an exhibit or attachment.

d. All e-filings, subject to subsection 6(d) above, shall be served on the parties in the same format and form as submitted to the participating courts.

8. Pleadings, Motions, and Documents not to be E-filed

The following documents shall not be e-filed during the pilot program and must be filed by the traditional methods provided in the MCR and the LAO:

a. documents to be filed under seal (pursuant to court order) and

b. documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

a. For purposes of this pilot program, e-filings are the official court record. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

b. Certified copies or true copies of e-filed documents shall be issued in the conventional manner by the

clerk's office in compliance with the Michigan Trial Court Case File Management Standards.

c. At the conclusion of the pilot program, if the program does not continue as a pilot project or in some other format, the clerk shall convert all e-filings to paper format in accordance with MCR 8.119(D)(1)(d). Participating attorneys shall provide reasonable assistance in constructing the paper record.

d. At the conclusion of the pilot program, if the program continues as a pilot project or in another format, the clerk shall provide for record retention and public access in a manner consistent with the instructions of the participating courts and the MCR.

10. Court Notices, Orders, and Judgments

At the participating court's discretion, the participating court may issue, file, and serve orders, judgments, and notices as e-filings. Pursuant to a stipulation and order, the parties may agree to accept service from the participating courts via facsimile pursuant to the procedures set forth in Rule 6(d) of this order.

11. Technical Malfunction

a. A party experiencing a technical malfunction with the party's equipment (such as a Portable Document Format [PDF] conversion problems or inability to access the pilot sites), another party's equipment (such an inoperable e-mail address), or an apparent technical malfunction of the participating court's pilot equipment, software, or server shall use reasonable efforts to timely file or receive service by traditional methods and shall provide prompt notice to the participating courts and the parties of any such malfunction.

b. If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party

may petition the participating courts for relief. Such petition shall contain adequate proof of the technical malfunction and set forth good cause for failure to use non-electronic means to timely file or serve a document. The participating courts shall liberally consider proof of the technical malfunction and use discretion in determining whether such relief is warranted.

12. Privacy Considerations

a. With respect to any e-filing, the following requirements for personal information shall apply:

i. Social Security Numbers. Pursuant to Administrative Order No. 2006-2, full social security numbers shall not be included in e-filings. If an individual's social security number must be referenced in an e-filing, only the last four digits of that number may be used and the number specified in substantially the following format: XXX-XX-1234.

ii. Names of Minor Children. Unless named as a party, the identity of minor children shall not be included in e-filings. If a non-party minor child must be mentioned, only the initials of the child's name may be used.

iii. Dates of Birth. An individual's full birthdate shall not be included in e-filings. If an individual's date of birth must be referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

iv. Financial Account Numbers. Full financial account numbers shall not be included in e-filings unless required by statute, MCR, or other authority. If a financial account number must be referenced in an e-filing, only the last four digits of the number may be used and the number specified in substantially the following format: XXXXX1234.

v. Driver's License Numbers and State-Issued Personal Identification Card Numbers. A person's full driver's license number and state-issued personal identification number shall not be included in e-filings. If an individual's driver's license number or state-issued personal identification card number must be reference in e-filing, only the last four digits of that number should be used and the number specified in substantially the following format X-XXX-XXX-XX1-234.

vi. Home Addresses. With the exception of a self-represented party, full home addresses shall not be included in e-filings. If an individual's home address must be referenced in an e-filing, only the city and state shall be used.

b. Parties wishing to file a complete personal data identifier listed above may:

i. Pursuant to and in accordance with the MCR and the LAO, file a motion to file a traditional paper version of the document under seal. The participating courts, in granting the motion to file the document under seal, may still require that an e-filing that does not reveal the complete personal data identifier be filed for the public files, or

ii. Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers included in the reference list shall be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

c. Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

i. Medical records, treatment and diagnosis;

ii. Employment history;

iii. Individual financial information;

iv. Insurance information;

v. Proprietary or trade secret information;

vi. Information regarding an individual's cooperation with the government; and

vii. Personal information regarding the victim of any criminal activity.

13. Records and Reports

Further, the participating courts will file a joint annual report covering the annual project progress by January 1 of each year (or more frequently or on another date as specified by the Court), that outlines the following:

a. Detailed financial data that show the total amount of money collected in fees for documents filed or served under the pilot project to date, the original projections for collections of fees, and whether the projections have been met.

b. Detailed financial information regarding the distribution or retention of collected fees, including the amount paid to each vendor per document and in total for the subject period and the amount retained by the participating courts or funding unit per document and in total for the period.

c. Detailed information regarding whether the monies retained by the participating courts are in a separate account or commingled with other monies.

d. A detailed itemization of all costs attributed to the project to date and a statement of whether and when each cost will recur.

e. A detailed itemization of all cost savings to the participating courts whether by reduced personnel or otherwise and a statement of whether any cost savings to the participating courts are reflected in the fee structure charged to the parties.

f. Information regarding how the filing and service fees were calculated and whether it is anticipated that those fees will be necessary and continued after the conclusion of the pilot program.

g. A statement of projections regarding anticipated e-filing and service-fee collections and expenditures for the upcoming periods.

14. Amendments

Procedural aspects of these rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator. Proposed substantive changes, including, for example, a proposed expansion of the program to permit additional case types and a proposed change in fees, must be submitted to the Supreme Court for approval.

15. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot program, allowing parties to electronically file documents in cases assigned to participating judges, shall continue until December 31, 2016.

ADMINISTRATIVE ORDER No. 2011-5

ADJUSTMENT OF DISCIPLINE PORTION OF STATE BAR OF MICHIGAN DUES

Entered October 6, 2011, effective immediately and applicable to the 2012 dues notice to be sent to members of the State Bar of Michigan (File No. 2011-02)—REPORTER.

Since 2003, each of the State Bar of Michigan's nearly 40,000 active members pays to the State Bar annual dues of $120 to support the attorney discipline system, in addition to $180 in general bar dues and $15 for the State Bar of Michigan's Client Security Fund. The attorney discipline system includes the Attorney Grievance Commission and Attorney Discipline Board; these agencies are funded almost entirely by attorney discipline dues.[1]

The attorney discipline system has become vastly overfunded, with a surplus of about $5 million. In light of this large surplus, the present $120 in discipline dues is not justified.

Accordingly, we adjust the amount of discipline dues to $110. This change will be reflected in the 2012 dues notice that goes to all bar members under Rule 4 of the Rules Concerning the State Bar.

[1] A small amount of support comes from fees paid for pro hac vice admissions, administrative costs and fees recovered by the discipline agencies, and earned interest.

ADMINISTRATIVE ORDER
No. 2011-6

PROPOSED E-FILING PROJECT IN OAKLAND PROBATE COURT

Entered October 20, 2011 (File No. 2002-37)—REPORTER.

On order of the Court, the Oakland County Probate Court is authorized to implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings in certain instances. The pilot project shall begin September 1, 2011, or as soon thereafter as is possible, and shall remain in effect until July 31, 2013, or further order of this Court. The Oakland County Probate Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the Oakland County Probate Court Electronic Document Filing Pilot Project, the Oakland County Probate Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The Oakland County Probate Court will track the participation and effectiveness of this pilot program and shall report to and provide information as requested by the State Court Administrative Office.

1. Construction

The purpose of the pilot program is to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot program. The Oakland County Probate Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing documents during the pilot program, the Michigan Rules of Court govern all other aspects of the cases involved in the pilot.

2. Definitions

(a) "Register" means the Oakland County Probate Register.

(b) "E-filing" means any court pleading, motion, brief, response, list, order, judgment, notice, claims, inventories, accounts, reports, or other documents filed electronically pursuant to the pilot program.

(c) "LAO" means all local administrative orders governing the Oakland County Probate Court.

(d) "MCR" means the Michigan Rules of Court.

(e) "Pilot program" means the initiative by the Oakland County Probate Court in conjunction with the Oakland County Department of Information Technology, and in part with Tyler, Inc. (Wiznet), and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, claims, inventories, accounts, reports, and other documents. The Oakland County pilot program will begin testing with one probate judge with "DE", "DA," "TV," and "CZ" case types. The court plans to expand the pilot program to all probate judges as soon as practicable.

(f) "Technical malfunction" means any hardware, software, or other malfunction that prevents a user from timely filing a complete e-filing or sending or receiving service of an e-filing.

(g) "Wiznet envelope" means an electronic submission that contains one or more Wiznet transactions.

(h) "Wiznet transaction" means the submission of one or more related documents which results in a single register of actions entry.

3. Participation in the Pilot Program

(a) Participation in the pilot program shall be mandatory in all newly filed DE, DA, TV or CZ case types assigned to the participating probate judges. Participation shall begin following the filing of the initial petition, complaint or other initiating document, and assignment of the case to a participating judge pursuant to the court's LAO. At the discretion of the judge, participation may also include post-disposition proceedings in qualifying case types assigned to participating judges.

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances may arise that will prevent a party from e-filing. To ensure that all parties retain access to the Courts, parties that demonstrate good cause will be permitted to file their documents with the register's office, who will then file the documents electronically. Among the factors that the Oakland County Probate Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing are a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel.

4. E-filings Submission, Acceptance, and Time of Service with the Court; Signature

(a) Program participants must submit e-filings pursuant to these rules and the pilot program's technical requirements. The register may, in accordance with MCR 8.119(C), reject documents submitted for filing that do not comply with MCR 5.113 or MCR 2.113(C)(2), are not accompanied by the proper fees, clearly violate Administrative Order No. 2006-2, do not conform to the technical requirements of this pilot project, or are otherwise submitted in violation of a statute, an MCR, an LAO, or the program rules.

(b) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the Oakland County Probate Court during the normal business hours of the register's office. E-filings submitted after business hours shall be deemed filed on the business day the e-filing is accepted for filing. The register's office shall process electronic submissions on a first-in, first-out basis.

(c) E-filings shall be treated as if they were hand delivered to the court for all purposes under statute, court rule, and administrative order.

(d) A pleading, document, or instrument e-filed or electronically served under this rule shall be deemed to have been signed by the judge, register, attorney, party, or declarant.

(i) Signatures submitted electronically shall be scanned copies of the actual signed document, or shall use the following form for the signature: */s/John L. Smith*.

(ii) A document that requires a signature under the penalty of perjury, or is required to be signed by the fiduciary or trustee under MCR 5.114(A)(3), is deemed

signed by the declarant or fiduciary if, before filing, the declarant or fiduciary has signed a printed form of the document.

(iii) An e-filed document that requires a signature of a notary public is deemed signed by the notary public if, before filing, the notary public has signed a printed form of the document.

(e) The original of a sworn or verified document that is an e-filing (e.g., a verified pleading) or part of an e-filing (e.g. an affidavit, notarization, or bill of costs) must be maintained by the filing attorney or self-represented litigant and made available upon reasonable request of the court, the signatory, or opposing party.

(f) Proposed orders shall be submitted to the court in accordance with the provisions of the pilot program. The court and the register shall exchange the documents for review and signature pursuant to MCR 2.602(B).

(g) By electronically filing the document, the electronic filer indicates compliance with these rules.

5. Time for Service and Filing of Pleadings, Documents, and Motions; Judge's Copies; Hearings on Motions; Fees

(a) All times for filing and serving filings shall be governed by the applicable statute, the MCR and the LAO as if the e-filings were hand delivered.

(b) The electronic submission of a motion and brief through this pilot program satisfies the requirements of filing a judge's copy where applicable under the MCR. Upon request by the court, the filing party shall promptly provide a traditional judge's copy to chambers.

(c) Applicable fees, including e-filing fees and service fees, shall be paid electronically through procedures established by the Oakland County Probate Court at the same time and in the same amount as required by statute, court rule, or administrative order. Inventory fees shall be paid according to procedures established by the court.

(i) Each e-filing is subject to the following e-filing fees:

Type of Filing	Fee
EFO (e-filing)	$5.00
EFS (e-filing with service)	$8.00
SO (service only)	$5.00

(ii) Users who use credit cards for payment are also responsible for a 3% user fee.

6. Service

(a) All parties shall register as a service contact with the Tyler (Wiznet) application which will provide the court and opposing parties with one e-mail address with the functionality required for the pilot program. All service shall originate from and be perfected upon this e-mail address.

(b) Unless otherwise agreed to by the court and the parties, all e-filings must be served electronically to the e-mail address of all interested parties. The subject matter line for the transmittal of document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

(c) The parties and the court may agree that, instead of e-mail service, e-filings may be served to the parties (but not the court) by other appropriate means under the MCR. For those choosing to accept facsimile service:

(i) the parties shall provide the court and the opposing parties with one facsimile number with appropriate functionality,

(ii) the facsimile number shall serve as the number to which service may be made,

(iii) the sender of the facsimile should obtain a confirmation of delivery, and

(iv) parties shall comply with the requirements of the MCR on the use of facsimile communication equipment.

(d) The court reserves the right to serve parties by traditional means, including facsimile, when necessary to ensure appropriate service of notices, opinions and orders, and other official court documents.

(e) Proof of Service shall be submitted to the Oakland County Probate Court according to the MCR and these rules.

7. Format and Form of E-filing and Service

(a) A party may only e-file documents for one case in each transaction.

(b) All e-filings shall comply with MCR 1.109 and the technical requirements of the court's vendor.

(c) Any exhibit or attachment that is part of an e-filing must be clearly designated and identified as an exhibit or attachment.

(d) All e-filings, subject to subsection 6(c) above, shall be served on the parties in the same format and form as submitted to the court.

8. Pleadings, Motions, and Documents Not to Be E-Filed

The following documents shall not be e-filed during the pilot program and must be filed by the traditional methods provided in the MCR and the LAO:

(a) documents to be filed under seal (pursuant to court order),

(b) initiating documents,

(c) original documents which are required by statute to be filed with the court, such as wills submitted for probate. In such case, the document shall be e-filed using a copy of the document and the original shall be delivered to the court for filing within 14 days of the e-filing date,

(d) inventories that are being presented pursuant to MCL 700.3706,

(e) documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

(a) For purposes of this pilot program, the electronic version of all documents filed with the Court, with the exception of documents filed under seal, is the official court record. An appellate record for the Court of Appeals shall be certified in accordance with MCR 7.210(A)(1).

(b) Certified copies of e-filed documents shall be issued in the conventional manner by the Oakland County Probate Register in compliance with the Michigan Trial Court Case File Management Standards.

(c) At the conclusion of the pilot program, if the program does not continue as a pilot project or in some other format, the register shall convert all e-filings to paper form in accordance with MCR 8.119(D)(1)(d). Participating attorneys shall provide reasonable assistance in constructing the paper record.

(d) At the conclusion of the pilot program, if the program continues as a pilot project or in another format, the register shall provide for record retention and public access in a manner consistent with the instructions of the court and the court rules.

10. Court Notices, Orders, and Judgments

At the court's discretion, the court and register may issue, file and serve orders, judgments, and notices as e-filings.

11. Technical Malfunctions

(a) A party experiencing a technical malfunction with the party's equipment (such as Portable Document Format [PDF] conversion problems or inability to access the pilot sites), another party's equipment (such as an inoperable e-mail address), or an apparent technical malfunction of the court's pilot equipment, software, or server shall use reasonable efforts to timely file or receive service by traditional methods and shall provide prompt notice to the court and the parties of any such malfunction.

(b) If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party may petition the Oakland County Probate Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use non-electronic means to timely file or serve a document. The court shall liberally consider proof of the technical malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations

(a) Social Security Numbers. Pursuant to Administrative Order No. 2006-2, full social security numbers shall not be included in e-filings. If an individual's social security number must be referenced in an e-filing, only the last four digits of that number may be used and the number specified in substantially the following format: XXX-XX-1234.

(b) Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

1. Medical records, treatment and diagnosis;

2. Employment history;

3. Individual financial information;

4. Insurance information;

5. Proprietary or trade secret information;

6. Information regarding an individual's cooperation with the government; and

7. Personal information regarding the victim of any criminal activity.

13. The Oakland Probate Court shall file an annual report with the Supreme Court covering the project to date by January 1 of each year (or more frequently or on another date as specified by the Court) that outlines the following:

(a) Detailed financial data that show the total amount of money collected in fees for documents filed or served under the pilot project to date, the original projections for collections of fees, and whether the projections have been met or exceeded.

(b) Detailed financial information regarding the distribution or retention of collected fees, including the amount paid to Tyler per document and in total for the subject period, the amount retained by the court per document and in total for the period, and whether the monies retained by the court are in a separate account or commingled with other monies.

(c) A detailed itemization of all costs attributed to the project to date and a statement of whether and when each cost will recur.

(d) A detailed itemization of all cost savings to the court whether by reduced personnel or otherwise and a statement of whether any cost savings to the court are reflected in the fee structure charged to the parties.

(e) Information regarding how the filing and service fees were calculated and whether it is anticipated that those fees will be necessary and continued after the conclusion of the pilot program.

(f) A statement of projections regarding anticipated e-filing and service-fee collections and expenditures for the upcoming periods.

14. Amendment

Procedural aspects of these rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator. Proposed substantive changes, including, for example, a proposed expansion of the program to permit additional case types and a proposed change in fees, must be submitted to the Supreme Court for approval.

15. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until July 31, 2013.

AMENDED ADMINISTRATIVE ORDER No. 2006-3

MICHIGAN UNIFORM SYSTEM OF CITATION

Entered September 28, 2011, effective immediately (amending Administrative Order No. 2006-3, entered March 15, 2006, at 474 Mich clviii) (File No. 2009-02)—REPORTER.

[The present language is amended below in underlining and overstriking.]

ADMINISTRATIVE ORDER NO. 2006-3. MICHIGAN UNIFORM SYSTEM OF CITATION.

[First three paragraphs unchanged.]

I. Citation of Authority

A. [Unchanged.]

B. Citation of Constitutions, Statutes, Regulations, Court Rules, and Jury Instructions

1.-5. [Unchanged.]

6. *Administrative rules.*

a. ~~1999 Administrative Code: 1999 AC,~~Mich Admin Code, R 408.41863.

b. If the rule has been amended or superseded, cite the appropriate Annual Supplement where available: 1983 ~~AACS~~Annual Admin Code Supp, R 408.41863, or a more recent revision in the *Michigan Register*: 1985 ~~MR~~Mich Reg 7, R 408.30495c.

(N.B.: Revisions appear monthly in the *Michigan Register* and are cumulated annually in ~~AACS~~Annual Admin Code Supp. E.g., regulations published in 1985 ~~MR~~Mich Reg, vols. 1-12, are later reprinted in 1985 ~~AACS~~Annual Admin Code Supp.)

Subsequent references may be shortened: Rule 408.41863.

2003 PA 53 amended §§ 55 and 59 of the Administrative Procedures Act, MCL 24.255 and 24.259, effective July 14, 2003, to provide that the official Michigan Administrative Code is what is published and annually supplemented on the ~~Office of Regulatory Reform~~Office of Regulatory Reinvention website at ~~<http://www.michigan.gov/orr.~~<http://www.michigan.gov/lara/0,1607,7-154-10576_35738---,00.html>.

C.-end [Unchanged.]

AMENDED ADMINISTRATIVE ORDER No. 2007-3

REVISED E-FILING PILOT PROJECT IN OAKLAND COUNTY

Entered October 20, 2011 (amending Administrative Order No. 2007-3, entered June 19, 2007, at 478 Mich lviii, and rescinding Administrative Order No. 2009-1, entered January 20, 2009, at 483 Mich lxxxix) (File No. 2002-37)—REPORTER.

On order of the Court, the 6th Circuit Court is authorized to implement an Electronic Document Filing Pilot Project. The pilot project is established to study the effectiveness of electronically filing court documents in lieu of traditional paper filings. The pilot project shall begin August 1, 2007, or as soon thereafter as is possible, and shall remain in effect until ~~July 30, 2009~~ July 30, 2013, or further order of this Court. The 6th Circuit Court is aware that rules regarding electronic filing have been published for comment by this Court. If this Court adopts electronic-filing rules during the pendency of the 6th Circuit Court Electronic Document Filing Pilot Project, the 6th Circuit Court will, within 60 days of the effective date of the rules, comply with the requirements of those rules.

The 6th Circuit Court will track the participation and effectiveness of this pilot program and shall report to and provide information as requested by the State Court Administrative Office.

On further order of the Court, the relevant contents of Administrative Order No. 2009-1 having been combined in this order, Administrative Order No. 2009-1 is rescinded, effective immediately.

[This administrative order supersedes the order that entered June 19, 2007. Changes are indicated in underlining and overstrike.]

1. Construction

The purpose of the pilot program is to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of the actions involved in the pilot program. The Sixth Circuit Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing documents during the pilot program, the Michigan Rules of Court govern all other aspects of the cases involved in the pilot.

2. Definitions

(a) "Clerk" means the Oakland County Clerk.

(b) "E-filing" means any court pleading, motion, brief, response, list, order, judgment, notice, or other document filed electronically pursuant to the pilot program.

(c) "LAO" means all local administrative orders governing the Sixth Judicial Circuit Court.

(d) "MCR" means the Michigan Rules of Court.

(e) "Pilot program" means the initiative by the Sixth Judicial Circuit Court, the Oakland County Clerk, and the Oakland County Department of Information Technology in conjunction with Wiznet, Inc., and under the supervision of the State Court Administrative Office. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents. All state

courts in Michigan are envisioned as eventually permitting e-filing (with appropriate modifications and improvements). The Oakland County pilot program will begin testing with four circuit judges with "C" or "N" type civil cases. The court plans to expand the pilot program to all circuit judges who wish to participate. ~~The pilot program is expected to last approximately two years, beginning on August 1, 2007.~~

(f) "Technical malfunction" means any hardware, software, or other malfunction that prevents a user from timely filing a complete e-filing or sending or receiving service of an e-filing.

3. Participation in the Pilot Program

(a) Participation in the pilot program shall be mandatory in all pending "A," "C," "P" or "N" type cases assigned to participating circuit judges. ~~Participation shall be assigned following the filing and service of the initial complaint or other initial filing and assignment of the case to a participating judge.~~ At the discretion of the judge, participation may also include postdisposition proceedings in qualifying case types assigned to participating judges.

Until April 30, 2012, court users will have the discretion to submit the initiating documents in "A," "C," "P" and "N" type cases and any fees associated with the documents either traditionally or electronically. Beginning May 1, 2012, submission of initiating documents shall be made electronically, subject to the exception created at subsection 3.3(b) below. The court shall provide on campus computer facilities at the county clerk's office and the law library to enable a party or attorney without a computer to e-file on campus.

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances

may arise that will prevent one from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their documents with the clerk, who will then file the documents electronically. Among the factors that the Sixth Circuit Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing are a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel. However, upon submission of proof of incarceration, a self-represented party shall be exempted from e-filing during the period of the individual's incarceration. Application for a waiver from e-filing at the time of case initiation shall be made to the chief judge or the chief judge's designate.

4. E-filings Submission, Acceptance, and Time of Service with the Court; Signature

(a) In an effort to facilitate uniform service within the scope of this project, the Sixth Circuit Court strongly recommends electronic service. However, service of process for initiating documents shall be made pursuant to MCR 2.105. After the initial process has been served and the defendant has registered as a user with the Tyler (Wiznet) e-filing system for the case, amendments to the initiating documents may be served electronically subject to the limitations or restrictions otherwise imposed in this order.

(b) Program participants must submit e-filings pursuant to these rules and the pilot program's technical requirements. The clerk may, in accordance with MCR 8.119(C), reject documents submitted for filing that do not comply with MCR 2.113(C)(1), are not accompanied by the proper fees, clearly violate Administrative Order No.

2006-2, do not conform to the technical requirements of this pilot project, or are otherwise submitted in violation of a statute, an MCR, an LAO, or the program rules.

(c) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the Oakland County Clerk's Office during the normal business hours of 8:00 a.m. to 4:30 p.m. E-filings submitted after business hours shall be deemed filed on the business day the e-filing is accepted (usually the next business day). The clerk shall process electronic submissions on a first-in, first-out basis.

(d) E-filings shall be treated as if they were hand delivered to the court for all purposes under statute, the MCR, and the LAO.

(e) A pleading, document, or instrument e-filed or electronically served under this rule shall be deemed to have been signed by the judge, court clerk, attorney, party, or declarant.

(i) Signatures submitted electronically shall use the following form: /s/ *John L. Smith*.

(ii) A document that requires a signature under the penalty of perjury is deemed signed by the declarant if, before filing, the declarant has signed a printed form of the document.

(iii) An e-filed document that requires a signature of a notary public is deemed signed by the notary public if, before filing, the notary public has signed a printed form of the document.

(f) The original of a sworn or verified document that is an e-filing (e.g., a verified pleading) or part of an e-filing (e.g., an affidavit, notarization, or bill of costs) must be maintained by the filing attorney and made available upon reasonable request of the court, the signatory, or opposing party.

(g) Proposed orders shall be submitted to the court in accordance with the provisions of the pilot program. The court and the clerk shall exchange the documents for review and signature pursuant to MCR 2.602(B).

(h) By electronically filing the document, the electronic filer indicates compliance with these rules.

5. Time for Service and Filing of Pleadings, Documents, and Motions; Judge's Copies; Hearings on Motions; Fees

(a) All times for filing and serving e-filings shall be governed by the applicable statute, the MCR and the LAO as if the e-filings were hand delivered. Where a praecipe is required by LCR 2.119(A), it must be e-filed along with the documents that require the praecipe, unless another court-approved mechanism is approved and used by the filer.

(b) The electronic submission of a motion and brief through this pilot program satisfies the requirements of filing a judge's copy under MCR 2.119(A)(2). Upon request by the court, the filing party shall promptly provide a traditional judge's copy to chambers.

(c) Applicable fees, including e-filing fees and service fees, shall be paid electronically through procedures established by the Oakland County Clerk's Office at the same time and in the same amount as required by statute, court rule, or administrative order.

(i) Each e-filing is subject to the following e-filing fees.

i. Each e-filing is subject to the following e-filing fees.

Type of Filing	Fee
EFO (e-filing only)	$5.00
EFS (e-filing with service)	$8.00
SO (service only)	$5.00

(ii) Users who use credit cards for payment are also responsible for a 3% user fee.

6. Service

(a) All parties shall register with the court ~~provide the court~~ and opposing parties ~~with~~ one e-mail address with the functionality required for the pilot program, through Tyler Odyssey File and Serve. All service shall originate from ~~and be perfected upon~~ this registered e-mail address. Additional e-mail addresses for other attorneys or staff persons associated with counsel for the party may be added as registered users. Service shall be perfected upon a self-represented party or counsel and any additional registered users associated with counsel at the e-mail addresses registered with the Tyler (Wiznet) e-filing system. Each individual bears the responsibility for the accuracy of the registered e-mail address.

(b) Unless otherwise agreed to by the court and the parties, all e-filings must be served electronically to the e-mail addresses of all parties. The subject matter line for the transmittal of document served by e-mail shall state: "Service of e-filing in case [insert caption of case]."

(c) The parties and the court may agree that, instead of e-mail service, e-filings may be served to the parties (but not the court) by facsimile or by traditional means. For those choosing to accept facsimile service:

(i) the parties shall provide the court and the opposing parties with one facsimile number with appropriate functionality,

(ii) the facsimile number shall serve as the number to which service may be made,

(iii) the sender of the facsimile should obtain a confirmation of delivery, and

(iv) parties shall comply with the requirements of MCR 2.406 on the use of facsimile communication equipment.

(d) Proof of Service shall be submitted to the Sixth Circuit Court according to MCR 2.107 and these rules.

7. Format and Form of E-filing and Service

(a) A party may only e-file documents for one case in each transaction.

(b) All e-filings shall comply with MCR 1.109 and the technical requirements of the court's vendor.

(c) Any exhibit or attachment that is part of an e-filing must be clearly designated and identified as an exhibit or attachment.

(d) All e-filings, subject to subsection 6(c) above, shall be served on the parties in the same format and form as submitted to the court.

8. Pleadings, Motions, and Documents not to be E-filed

The following documents shall not be e-filed during the pilot program and must be filed by the traditional methods provided in the MCR and the LAO:

(a) documents to be filed under seal (pursuant to court order), and

~~(b) initiating documents, and~~

~~(c)~~(b)documents for case evaluation proceedings.

9. Official Court Record; Certified Copies

(a) ~~For purposes of this pilot program, e-filings are the official court record.~~ The official record, with the exception of documents filed under seal [see subsection 8(a) of this administrative order and MCR 8.119(F)] is the electronic version of all documents filed with the court. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

(b) Certified or true copies of e-filed documents shall be issued in the conventional manner by the Oakland County Clerk's Office in compliance with the Michigan Trial Court Case File Management Standards.

(c) At the conclusion of the pilot program, if the program does not continue as a pilot project or in some other format, the clerk shall convert all e-filings to paper form in accordance with MCR 8.119(D)(1)(d). Participating attorneys shall provide reasonable assistance in constructing the paper record.

(d) At the conclusion of the pilot program, if the program continues as a pilot project or in another format, the clerk shall provide for record retention and public access in a manner consistent with the instructions of the court and the court rules.

10. Court Notices, Orders, and Judgments

At the court's discretion, the court may issue, file, and serve orders, judgments, and notices as e-filings. Pursuant to a stipulation and order, the parties may agree to accept service from the court via facsimile pursuant to the procedures set forth in Rule 6(c).

11. Technical Malfunctions

(a) A party experiencing a technical malfunction with the party's equipment (such as Portable Document Format [PDF] conversion problems or inability to access the pilot sites), another party's equipment (such as an inoperable e-mail address), or an apparent technical malfunction of the court's pilot equipment, software, or server shall use reasonable efforts to timely file or receive service by traditional methods and shall provide prompt notice to the court and the parties of any such malfunction.

(b) If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfect-

ing or receiving service of an e-filing, the affected party may petition the Sixth Circuit Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use nonelectronic means to timely file or serve a document. The court shall liberally consider proof of the technical malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations

(a) With respect to any e-filing, the following requirements for personal information shall apply:

1. Social Security Numbers. Pursuant to Administrative Order No. 2006-2, full social security numbers shall not be included in e-filings. If an individual's social security number must be referenced in an e-filing, only the last four digits of that number may be used and the number specified in substantially the following format: XXX-XX-1234.

2. Names of Minor Children. Unless named as a party, the identity of minor children shall not be included in e-filings. If a nonparty minor child must be mentioned, only the initials of that child's name may be used.

3. Dates of Birth. An individual's full birthdate shall not be included in e-filings. If an individual's date of birth must be referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

4. Financial Account Numbers. Full financial account numbers shall not be included in e-filings unless required by statute, court rule, or other authority. If a financial account number must be referenced in an e-filing, only the last four digits of these numbers may

be used and the number specified in substantially the following format: XXXXX1234.

5. Driver's License Numbers and State-Issued Personal Identification Card Numbers. A person's full driver's license number and state-issued personal identification number shall not be included in e-filings. If an individual's driver's license number or state-issued personal identification card number must be referenced in an e-filing, only the last four digits of that number should be used and the number specified in substantially the following format: X-XXX-XXX-XX1-234.

6. Home Addresses. With the exception of a self-represented party, full home addresses shall not be included in e-filings. If an individual's home address must be referenced in an e-filing, only the city and state should be used.

(b) Parties wishing to file a complete personal data identifier listed above may:

1. Pursuant to and in accordance with the MCR and the LAO, file a motion to file a traditional paper version of the document under seal. The court, in granting the motion to file the document under seal, may still require that an e-filing that does not reveal the complete personal data identifier be filed for the public files.

or

2. Pursuant to and in accordance with the applicable MCR and LAO, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be construed to refer to the corre-

sponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

(c) Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

1. Medical records, treatment and diagnosis;

2. Employment history;

3. Individual financial information;

4. Insurance information;

5. Proprietary or trade secret information;

6. Information regarding an individual's cooperation with the government; and

7. Personal information regarding the victim of any criminal activity.

13. Further, the Oakland Circuit Court shall file an annual report with the Court by January 1 of each year (or more frequently or on another date as specified by the Court) that outlines the following:

a. Detailed financial data that shows the total amount of money collected in fees for documents filed and/or served under the pilot project to date, the original projections for collections of fees, and whether the projections have been met or exceeded.

b. Detailed financial information regarding the distribution/retention of collected fees, including the amount paid to Wiznet per document and in total for the subject period and the amount retained by the court per document and in total for the period, and whether the monies retained by the court are in a separate account or commingled with other monies.

c. A detailed itemization of all costs attributed to the project to date and a statement of whether and when each cost will recur.

d. A detailed itemization of all cost savings to the court whether by reduced personnel or otherwise and a statement of whether any cost savings to the court are reflected in the fee structure charged to the parties.

e. Information regarding how the filing and service fees were calculated and whether it is anticipated that those fees will be necessary and continued after the conclusion of the pilot program.

f. A statement of projections regarding anticipated e-filing and service-fee collections and expenditures for the upcoming periods.

~~13~~14. Amendment

~~These rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the state court administrator.~~ Procedural aspects of these rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator. Proposed substantive changes, including, for example, a proposed expansion of the program to permit additional case types and a proposed change in fees, must be submitted to the Supreme Court for approval.

~~14~~15. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until July 30, ~~2009~~2013.

AMENDED ADMINISTRATIVE ORDER No. 2010-3

REVISED E-FILING PILOT PROJECT IN OAKLAND CIRCUIT COURT, FAMILY DIVISION

Entered October 20, 2011 (amending Administrative Order No. 2010-3, entered March 16, 2010, at 485 Mich civ) (File No. 2002-37)—REPORTER.

On order of the Court, the Sixth Judicial Circuit Court, in consultation with the State Court Administrative Office (SCAO), developed this pilot project to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of Family Division actions in a mandatory electronic filing environment.

Beginning March 16, 2010, or as soon thereafter as is possible and effective until December 31, 2012 or further order of this court, the Sixth Judicial Circuit Court adopts an e-filing pilot program requiring parties to electronically file documents in cases assigned to one or more participating judges. Rules designed to address issues unique to the implementation of this program are attached to and incorporated by reference to this local administrative order. Participation in this pilot program is mandatory for cases with a "DO" case code and assigned to pilot program judge(s), and, effective immediately, will be gradually implemented for cases with a "DM" case code.

The Sixth Judicial Circuit Court will track the participation and effectiveness of this pilot program and report the results to the SCAO.

[This administrative order supersedes the order that entered March 16, 2010. Changes are indicated in underlining and overstriking.]

1. Construction

The purpose of the pilot is to study the effectiveness of electronically filing court documents in connection with the just, speedy, and economical determination of divorce actions involved in the pilot. The Court may exercise its discretion to grant necessary relief to avoid the consequences of error so as not to affect the substantial rights of the parties. Except for matters related to electronically filing documents during the pilot, the Michigan Rules of Court govern all other aspects of the cases involved in the pilot.

2. Definitions

(a) "Clerk" means the Oakland County Clerk.

(b) "E-filing" means any court pleading, motion, brief, response, list, order, judgment, notice, or other document filed electronically pursuant to the pilot.

(c) "LAO" means all local administrative orders governing the Sixth Judicial Circuit Court.

(d) "MCR" means the Michigan Rules of Court.

(e) "Pilot" means the initiative by the Sixth Judicial Circuit Court, the Oakland County Clerk, and the Oakland County Department of Information Technology in conjunction with Wiznet, Inc. and under the supervision of the SCAO. This e-filing application facilitates the electronic filing of pleadings, motions, briefs, responses, lists, orders, judgments, notices, and other documents. The vision is that all state courts in Michi-

gan will eventually permit e-filing (with appropriate modifications and improvements). The Oakland County pilot will begin testing with two Circuit Court judges with "DO" type civil cases. "DM" type cases are also included in the scope of this pilot project. The Court plans to expand the pilot to all Family Division judges who wish to participate. The pilot program is expected to last approximately two years, beginning on January 1, 2010.

(f) "Technical malfunction" means any hardware, software, or other malfunction that prevents a user from timely filing a complete e-filing or sending or receiving service of an e-filing.

(g) "Wiznet envelope" means an electronic submission that contains one or more Wiznet transactions.

(h) "Wiznet transaction" means the submission of one or more related documents which results in a single register of actions entry. A single register of actions entry is determined by the Clerk. E.g. a motion, brief, affidavit, notice of hearing, and proof of service for a single motion submitted at one time frequently constitutes a single register of actions entry.

3. Participation in the Pilot

(a) Participation in the Pilot program shall be mandatory in all pending or newly filed "DO" type cases assigned to participating Circuit Court judges. Participation for new filings shall begin following the filing of the initial complaint or other initiating document, and assignment of the case to a participating judge. At the discretion of the e-filing judge, participation in the pilot may also include proceedings in post-disposition cases assigned to the pilot judge.

In addition, this order authorizes e-filing for all "DM" cases. Recognizing the logistical challenges asso-

ciated with implementing e-filing in "DM" cases, the Court authorizes the Family Division of the Sixth Circuit Court to gradually implement the pilot beginning with a limited number of cases assigned to a single judge and a single Friend of the Court referee team assigned to that judge. The Sixth Circuit Court may expand the scope of the pilot at any time to include additional judges and/or FOC referee teams without further authorization of the Court.

(b) This is a mandatory e-filing project. It is presumed that all documents will be filed electronically. However, the Court recognizes that circumstances will arise which prevent one from e-filing. To ensure that all parties retain access to the courts, parties that demonstrate good cause will be permitted to file their documents with the Clerk, who will then file the documents electronically. Among the factors that the Court will consider in determining whether good cause exists to excuse a party from mandatory e-filing are a party's access to the Internet and indigency. A self-represented party is not excused from the project merely because the individual does not have counsel.

4. E-filings Submission, Acceptance, and Time of Service with the Court; Signature

(a) Program participants must submit e-filings pursuant to these rules and the Pilot program's technical requirements. The Clerk may, in accordance with MCR 8.119(C) reject documents submitted for filing that do not comply with MCR 2.113(C), are not accompanied by the proper fees, clearly violate AO 2006-2, do not conform to the technical requirements of this pilot project, or are otherwise submitted in violation of statute, court rule, administrative order, or program rules.

(b) E-filings may be submitted to the court at any time, but shall only be reviewed and accepted for filing by the Oakland County Clerk's Office during normal business hours of 8:00 a.m. to 4:30 p.m. E-filings submitted after business hours shall be deemed filed the business day the e-filing is accepted (usually the next business day). The Clerk shall process electronic submissions on a first in/ first out basis.

(c) E-filings shall be treated as if they were hand delivered to the court for all purposes under statute, court rule, and administrative order.

(d) A pleading, document, or instrument e-filed or electronically served under this rule shall be deemed to have been signed by the judge, court clerk, attorney, party, or declarant.

(i) Signatures submitted electronically shall use the following form: /s/ *John L. Smith*.

(ii) A document that requires a signature under the penalty of perjury is deemed signed by the declarant if, before filing, the declarant has signed a printed form of the document.

(iii) An e-filed document that requires a signature of a notary public is deemed signed by the notary public if, before filing, the notary public has signed a printed form of the document.

(e) The original of a sworn or verified document that is an e-filing (e.g., a verified pleading) or part of an e-filing (e.g., an affidavit, notarization, or bill of costs) must be maintained by the filing attorney or self represented litigant and made available upon reasonable request of the court, the signatory, or opposing party.

(f) Proposed orders shall be submitted to the court in accordance with the provisions of the pilot. The Court

and Clerk shall exchange the documents for review and signature pursuant to MCR 2.602(B).

(g) By electronically filing the document, the electronic filer indicates compliance with these rules.

5. Time for Service and Filing of Pleadings, Documents, and Motions; Judge's Copies; Hearings on Motions; Fees

(a) All times for filing and serving e-filings shall be governed by the applicable statute, court rule, and administrative order as if the e-filings were hand delivered. Where a praecipe is required by LCR 2.119(A), it must be submitted electronically to the Court through the epraecipe application at http://courts.oakgov.com/ePraecipe/.

(b) The electronic submission of a motion and brief through this Pilot program satisfies the requirements of filing a Judge's Copy under MCR 2.119(A)(2). Upon a request of the Court, the filing party shall promptly provide a traditional paper Judge's Copy to chambers.

(c) Applicable fees, including e-file fees and service fees, shall be paid electronically through procedures established by the Oakland County Clerk's Office at the same time and in the same amount as required by statute, court rule, or administrative order.

(i) Each e-filing is subject to the following e-file fees.

Type of Filing	Fee
EFO (e-filing only)	$5.00
EFS (e-filing with service)	$8.00
SO (service only)	$5.00

(ii) Users who use credit cards for payment are also responsible for a 3% user fee.

6. Service

(a) All parties shall register as a service contact with the Wiznet application which will provide the court and opposing parties with one email address with the functionality required for the Pilot program.

(b) It is highly recommended that all e-filings must be served electronically to the email addresses of all parties.

(c) The parties and court may agree that, instead of eservice, e-filings may be served to the parties (but not the court) as provided in MCR 2.107.

(d) For those choosing to accept facsimile service:

(i) the parties shall provide the court and opposing parties with one facsimile number with appropriate functionality,

(ii) the facsimile number shall serve as the number to which service may be made,

(iii) the sender of the facsimile should obtain a confirmation of delivery, and

(iv) parties shall comply with the requirements of MCR 2.406 on the use of facsimile communication equipment.

(e) Proof of Service shall be submitted to the Court according to MCR 2.107 and these rules.

7. Format and Form of E-filing and Service

(a) A party may only e-file documents for one case per Wiznet envelope.

(b) A party may e-file multiple Wiznet transactions within a single Wiznet envelope, subject to subrule 7(a).

(c) All e-filings shall comply with MCR 1.109 and the technical requirements of the Court's vendor.

(d) Any exhibit or attachment that is part of an e-filing must be clearly designated and identified as an exhibit or attachment.

(e) All e-filings, subject to subsection 6(c) above, shall be served on the parties in same format and form as submitted to the court.

8. Pleadings, Motions, and Documents not to be E-filed

The following documents shall not be e-filed during the Pilot program and must be filed by the traditional methods provided in the court rules and administrative orders:

(a) documents to be filed under seal (pursuant to court order), ~~and~~

(b) initiating documents, and

(c) documents related to divorce proceedings that are not filed in the court file, such as a verified statement of divorce and judgment information forms.

9. Official Court Record; Certified Copies

(a) For purposes of this Pilot program, the electronic version of all documents filed with the Court , with the exception of documents filed under seal [see 8(a) and MCR 8.119(F)] is the official court record. An appellate record shall be certified in accordance with MCR 7.210(A)(1).

(b) Certified or true copies of e-filed documents shall be issued in the conventional manner by the Oakland County Clerk's Office in compliance with the Michigan Trial Court Case File Management Standards.

(c) ~~At the conclusion of the Pilot program, if the program does not continue as a Pilot project or in some other format, the Clerk shall retain all e-filed documents in accordance with MCR 8.119(D)(1)(d).~~ At the

conclusion of the pilot program, if the program does not continue as a pilot project or in some other format, the clerk shall convert all e-filings to paper form in accordance with MCR 8.119(D)(1)(d). Participating attorneys shall provide reasonable assistance in constructing the paper record.

(d) At the conclusion of the Pilot program, if the program continues as a Pilot project or in another format, the Court and Clerk shall provide for record retention and public access in a manner consistent with the instructions of the court and court rules.

10. Court Notices, Orders, and Judgments

The Court shall issue, file, and serve orders, judgments, and notices as e-filings. A party exempted from e-filing under this pilot shall be served in accordance with MCR 2.107(C).

11. Technical Malfunctions

(a) A party experiencing a technical malfunction with the party's equipment (such as PDF conversion problems or inability to access the Pilot sites), another party's equipment (such as an inoperable email address), or an apparent technical malfunction of the court's Pilot equipment, software or server shall use reasonable efforts to timely file or receive service as provided in these rules and shall provide prompt notice to the court and parties of any such malfunction.

(b) If a technical malfunction has prevented a party from timely filing, responding to, or otherwise perfecting or receiving service of an e-filing, the affected party may petition the Court for relief. Such petition shall contain an adequate proof of the technical malfunction and set forth good cause for failure to use non-electronic means to timely file or serve a document. The Court

shall liberally consider proof of the technical malfunction and use its discretion in determining whether such relief is warranted.

12. Privacy Considerations

(a) With respect to any e-filing, the following requirements for personal information shall apply:

1. **Social Security Numbers**. Pursuant to Administrative Order 2006-2, full social security numbers shall not be included in any e-filings. If an individual's social security number must be referenced in an e-filing, only the last four digits of that number may be used and the number specified in substantially the following format: XXX-XX-1234.

2. **Names of Minor Children**. Unless named as a party or otherwise required by statute, court rule, or administrative order, the identity of minor children shall not be included in any e-filings. If a non-party minor child must be mentioned, only the initials of that child's name may be used.

3. **Dates of Birth**. Except as required by statute, court rule, or administrative order, an individual's full birth date shall not be included in any e-filings. Subject to the above limitation, if an individual's date of birth is otherwise referenced in an e-filing, only the year may be used and the date specified in substantially the following format: XX/XX/1998.

4. **Financial Account Numbers**. Full Financial account numbers shall not be included in any e-filings unless required by statute, court rule, or other authority. If a financial account number must be referenced in an e-filing, only the last four digits of these numbers may be used and the number specified in substantially the following format: XXXXX1234.

5. **Driver's License Numbers and State-Issued Personal Identification Card Numbers**. A person's full Driver's license number and state-issued personal identification number shall not be included in any e-filings. If an individual's driver's license number or state-issued personal identification card number must be referenced in an e-filing, only the last four digits of that number should be used and the number specified in substantially the following format: X-XXX-XXX-XX1-234.

6. **Home Addresses**. With the exception of a self-represented party, full home addresses shall not be included in any e-filings. If an individual's home address must be referenced in an e-filing, only the city and state should be used. For a party whose address has been made confidential by court order pursuant to MCR 3.203(F), the alternative address shall be treated as specified above.

(b) Parties wishing to file a complete personal data identifier listed above may:

1. Pursuant to and in accordance with court rules and administrative orders, file a motion to file a traditional paper version of the document under seal. The Court may, in granting the motion to file the document under seal, still require that an e-filing that does not reveal the complete personal data identifier be filed for the public files.

OR

2. Pursuant to and in accordance with the applicable court rules and administrative orders, obtain a court order to file a traditional paper reference list under seal. The reference list shall contain the complete personal data identifiers and the redacted identifiers used in the e-filing. All references in the case to the redacted identifiers included in the reference list shall be con-

strued to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, and may be amended as of right.

(c) Parties should exercise caution when filing papers that contain private or confidential information, including, but not limited to, the information covered above and listed below:

1. Medical records, treatment and diagnosis;

2. Employment history;

3. Individual financial information;

4. Insurance information;

5. Proprietary or trade secret information;

6. Information regarding an individual's cooperation with the government; and

7. Personal information regarding the victim of any criminal activity.

(d) These rules are designed to protect the private personal identifiers and information of individuals involved or referenced in actions before the Court. Nothing in these rules should be interpreted as authority for counsel or a self represented litigant to deny discovery to the opposing party under the umbrella of complying with these rules.

13. Amendment

Procedural aspects of these rules may be amended upon the recommendation of the participating judges, the approval of the chief judge, and authorization by the State Court Administrator. Proposed substantive changes, including, for example, a proposed expansion of the program to permit additional case types and a proposed change in fees, must be submitted to the Supreme Court for approval. ~~These rules may be amended upon the recommendation of the participating~~

~~judges, the approval of the Chief Judge, and authorization by the State Court Administrator.~~

14. Financial data.

Detailed financial data as defined in Administrative Order No. 2009-1, including costs generated and savings realized under the terms of this e-filing pilot project, shall be included in the Oakland Circuit Court's annual report for submission to this Court.

15. Expiration

Unless otherwise directed by the Michigan Supreme Court, this pilot program, requiring parties to electronically file documents in cases assigned to participating judges, shall continue until December 31, 2012 or further order of this court.

AMENDMENTS OF MICHIGAN COURT RULES OF 1985

Adopted September 28 2011, effective immediately (File No. 2009-02)—REPORTER.

[The present language is amended below with additions indicated in underlining and deletions indicated in strikeover.]

RULE 2.105. PROCESS; MANNER OF SERVICE.

(A)-(C) [Unchanged.]

(D) Private Corporations, Domestic and Foreign. Service of process on a domestic or foreign corporation may be made by

(1)-(3) [Unchanged.]

(4) sending a summons and a copy of the complaint by registered mail to the corporation or an appropriate corporation officer and to the ~~Michigan Corporations and Securities Bureau~~ Michigan Bureau of Commercial Services, Corporation Division if

(a)-(c) [Unchanged.]

(E) [Unchanged.]

(F) Service on Insurer. ~~If service on an insurer is made by serving the Commissioner of Insurance, as permitted by statute, 2 summonses and a copy of the complaint must be delivered or mailed by registered mail to the office of the Commissioner of Insurance.~~ To the extent that it is permitted by statute, service on an

insurer may be satisfied by providing two summonses and a copy of the complaint to the Commissioner of the Office of Financial and Insurance Regulation via delivery or registered mail.

(G)-(K) [Unchanged.]

RULE 2.612. RELIEF FROM JUDGMENT OR ORDER.

(A)-(B) [Unchanged.]

(C) Grounds for Relief From Judgment.

(1) [Unchanged.]

(2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. Except as provided in MCR 2.614(A)(1), a ~~A~~ motion under this subrule does not affect the finality of a judgment or suspend its operation.

(3) [Unchanged.]

RULE 3.612. WINDING UP OF CORPORATION WHOSE TERM OR CHARTER HAS EXPIRED.

(A) Scope; Rules Applicable. This rule applies to actions under MCL ~~600.3520~~450.1801 *et seq*. The general rules of procedure apply to these actions, except as provided in this rule and in MCL ~~600.3520~~450.1801 *et seq*.

(B)-(H) [Unchanged.]

RULE 3.802. MANNER AND METHOD OF SERVICE.

(A)-(B) [Unchanged.]

(C) Service When Whereabouts of Noncustodial Parent Is Unascertainable. If service of a petition to terminate the parental rights of a noncustodial parent pursuant to MCL 710.51(6) cannot be made under subrule

(A)(2)~~(b)~~ because the whereabouts of the noncustodial parent has not been ascertained after diligent inquiry, the petitioner must file proof, by affidavit or by declaration under MCR 2.114(B)(2), of the attempt to locate the noncustodial parent. If the court finds, on reviewing the affidavit or declaration, that service cannot be made because the whereabouts of the person has not been determined after reasonable effort, the court may direct any manner of substituted service of the notice of hearing, including service by publication.

RULE 3.903. DEFINITIONS.

(A)-(B) [Unchanged.]

(C) Child Protective Proceedings. When used in child protective proceedings, unless the context otherwise indicates:

(1)-(4) [Unchanged.]

(5) "Lawyer-guardian ad litem" means that term as defined in MCL 712A.13a(1)~~(f)~~(g).

(6)-(10) [Unchanged.]

(D)-(F) [Unchanged.]

RULE 3.920. SERVICE OF PROCESS.

(A) [Unchanged.]

(B) Summons.

(1) [Unchanged.]

(2) When Required. Except as otherwise provided in these rules, the court shall direct the service of a summons in the following circumstances:

(a) In a delinquency proceeding, a summons must be served on the parent or parents, guardian, or legal custodian having physical custody of the juvenile, directing them to appear with the juvenile for trial. The

juvenile must also be served with a summons to appear for trial. A parent without physical custody must be notified by service as provided in subrule ~~(C)~~(D), unless the whereabouts of the parent remain unknown after a diligent inquiry.

(b) In a child protective proceeding, a summons must be served on the respondent. A summons may be served on a person having physical custody of the child directing such person to appear with the child for hearing. A parent, guardian, or legal custodian who is not a respondent must be served with notice of hearing in the manner provided by subrule ~~(C)~~(D).

(c) [Unchanged.]

(3)-(5) [Unchanged.]

(C) [Unchanged.]

(D) Notice of Hearing.

(1) General. Notice of a hearing must be given in writing or on the record at least 7 days before the hearing except as provided in subrules ~~(C)~~(D)(2) and ~~(C)~~(D)(3), or as otherwise provided in the rules.

(2)-(4) [Unchanged.]

(E)-(F) [Unchanged.]

(G) Subsequent Notices. After a party's first appearance before the court, subsequent notice of proceedings and pleadings shall be served on that party or, if the party has an attorney, on the attorney for the party as provided in subrule ~~(C)~~(D), except that a summons must be served for trial or termination hearing as provided in subrule (B).

(H)-(I) [Unchanged.]

RULE 3.921. PERSONS ENTITLED TO NOTICE.

(A) [Unchanged.]

(B) Protective Proceedings.

(1) General. In a child protective proceeding, except as provided in subrules (B)(2) and (3), the court shall ensure that the following persons are notified of each hearing:

(a) the respondent,

(b) the attorney for the respondent,

(c) the lawyer-guardian ad litem for the child,

(d) subject to subrule ~~(C)~~(D), the parents, guardian, or legal custodian, if any, other than the respondent,

(e)-(i) [Unchanged.]

(2) Dispositional Review Hearings and Permanency Planning Hearings. Before a dispositional review hearing or a permanency planning hearing, the court shall ensure that the following persons are notified in writing of each hearing:

(a) the agency responsible for the care and supervision of the child,

(b) the person or institution having court-ordered custody of the child,

(c) the parents of the child, subject to subrule ~~(C)~~(D), and the attorney for the respondent parent, unless parental rights have been terminated,

(d)-(m) [Unchanged.]

(3) [Unchanged.]

(C) [Unchanged.]

(D) Putative Fathers. If, at any time during the pendency of a proceeding, the court determines that the minor has no father as defined in MCR 3.903(A)(7), the court may, in its discretion, take appropriate action as described in this subrule.

(1) [Unchanged.]

(2) After notice to the putative father as provided in subrule ~~(C)~~(D)(1), the court may conduct a hearing and determine, as appropriate, that:

(a) the putative father has been served in a manner that the court finds to be reasonably calculated to provide notice to the putative father.

(b) a preponderance of the evidence establishes that the putative father is the natural father of the minor and justice requires that he be allowed 14 days to establish his relationship according to MCR 3.903(A)(7). The court may extend the time for good cause shown.

(c) there is probable cause to believe that another identifiable person is the natural father of the minor. If so, the court shall proceed with respect to the other person in accord with subrule ~~(C)~~(D).

(d) after diligent inquiry, the identity of the natural father cannot be determined. If so, the court may proceed without further notice and without appointing an attorney for the unidentified person.

(3) [Unchanged.]

(E) [Unchanged.]

RULE 3.929. USE OF FACSIMILE COMMUNICATION EQUIPMENT.

The parties may file records, as defined in MCR 3.903(A)~~(24)~~(25), by the use of facsimile communication equipment. Filing of records by the use of facsimile communication equipment in juvenile proceedings is governed by MCR 2.406.

RULE 3.979. JUVENILE GUARDIANSHIPS.

(A) Appointment of Juvenile Guardian; Process. If the Court determines at a posttermination review hear-

ing or a permanency planning hearing that it is in the child's best interests, the court may appoint a juvenile guardian for the child pursuant to MCL 712A.19a or MCL 712A.19c.

(1)-(2) [Unchanged.]

(3) If the parental rights over a child who is the subject of a proposed juvenile guardianship have been terminated, the court shall not appoint a guardian without the written consent of the Michigan Children's Institute (MCI) superintendent. The court may order the Department of Human Services to seek the consent of the MCI superintendent. The consent must be filed with the court no later than 28 days after the permanency planning hearing or the posttermination review hearing, or such longer time as the court may allow for good cause shown.

(a) [Unchanged.]

(b) If a motion is filed alleging that the MCI superintendent's failure to consent was arbitrary and capricious, the court shall set a hearing date and ensure that notice is provided to the MCI superintendent and all parties entitled to notice under MCR 3.921.

(c) [Unchanged.]

(B)-(F) [Unchanged.]

RULE 5.125. INTERESTED PERSONS DEFINED.

(A)-(B) [Unchanged.]

(C) Specific Proceedings. Subject to subrules (A) and (B) and MCR 5.105(E), the following provisions apply. When a single petition requests multiple forms of relief, the petitioner must give notice to all persons interested in each type of relief:

(1)-(24) [Unchanged.]

(25) The persons interested in a petition for the

modification or termination of a guardianship or conservatorship or for the removal of a guardian or a conservator are

(a) those interested in a petition for appointment under subrule (C)(19), (21), (22), or ~~(23)~~(24) as the case may be, and

(b) the guardian or conservator.

(26)-(33) [Unchanged.]

(D)-(E) [Unchanged.]

RULE 5.128. CHANGE OF VENUE.

(A) [Unchanged.]

(B) Procedure. If venue is changed

(1) [Unchanged.]

(2) except as provided in MCR ~~5.306(A)~~5.208(A) or unless the court directs otherwise, notices required to be published must be published in the county to which venue was changed.

RULE 6.509. APPEAL.

(A) Availability of Appeal. Appeals from decisions under this subchapter are by application for leave to appeal to the Court of Appeals pursuant to MCR 7.205. The ~~12-month~~6-month time limit provided by MCR 7.205(F)(3), runs from the decision under this subchapter. Nothing in this subchapter shall be construed as extending the time to appeal from the original judgment.

(B)-(D) [Unchanged.]

RULE 7.208. AUTHORITY OF COURT OR TRIBUNAL APPEALED FROM.

(A) [Unchanged.]

(B) Postjudgment Motions in Criminal Cases.

(1) No later than 56 days after the commencement of the time for filing the defendant-appellant's brief as provided by MCR 7.212(A)(1)(a)(iii), the defendant may file in the trial court a motion for a new trial, for judgment of acquittal, to withdraw a plea, or ~~for resentencing~~ to correct an invalid sentence.

(2)-(6) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 7.210. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

(1) Appellant's Duties; Orders; Stipulations.

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Except in cases governed by MCR 3.977~~(I)(3)~~(J)(3) or MCR 6.425(G)(2), or as otherwise provided by Court of Appeals order or the remainder of this subrule, the appellant shall order from the court reporter or recorder the full transcript of testimony and other proceedings in the trial court or tribunal. Once an appeal is filed in the Court of Appeals, a party must serve a copy of any request for transcript preparation on opposing counsel and file a copy with the Court of Appeals.

(b)-(e) [Unchanged.]

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 7.316. MISCELLANEOUS RELIEF OBTAINABLE IN SUPREME COURT.

(A) [Unchanged.]

(B) Allowing Act After Expiration of Time. When, under the practice relating to appeals or stay of proceedings, a nonjurisdictional act is required to be done within a designated time, the Supreme Court may at any time, on motion and notice, permit it to be done after the expiration of the period on a showing made to the Court that there was good cause for the delay or that it was not due to the culpable negligence of the appellant. The Court will not entertain a motion to file a late application for leave to appeal under MCR 7.302(C)(3) or MCR 7.302(D)(2) or a late motion for reconsideration under MCR 7.313~~(E)~~(F).

(C)-(D) [Unchanged.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A)-(D) [Unchanged.]

(E) Access to Records. The clerk may not permit any record or paper on file in the clerk's office to be taken from it without the order of the court.

(1)-(3) [Unchanged.]

(4) Every court~~,~~ shall adopt an administrative order pursuant to MCR 8.112(B) to

(a)-(c) [Unchanged.]

(F)-(G) [Unchanged.]

Staff Comment: The above noted changes are minor revisions of the rules that have been recommended to the Court to correct cross references and to reflect other technical changes.

The staff comment is not an authoritative construction by the Court.

Adopted October 6, 2010, effective January 1, 2012 (File No. 2010-11)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 2.511. IMPANELING THE JURY.

(A)-(B) [Unchanged.]

(C) Examination of Jurors; Discharge of Unqualified Juror. The court may conduct the examination of prospective jurors or may permit the attorneys to do so. When the court finds that a person in attendance at court as a juror is not qualified to serve as a juror, the court shall discharge him or her from further attendance and service as a juror.

(D)-(H) [Unchanged.]

Staff Comment: Because MCL 600.1337 requires a court to discharge an unqualified juror regardless whether a party challenges the juror for cause, the amendment of MCR 2.511 clarifies that the discharge must be made when the court learns that the juror is not qualified to serve.

The staff comment is not an authoritative construction by the Court.

Adopted October 6, 2011, effective January 1, 2011 (File No. 2010-17)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 3.707. MODIFICATION, TERMINATION, OR EXTENSION OF ORDER.

(A) Modification or Termination.

(1) Time for Filing and Service.

(a) The petitioner may file a motion to modify or terminate the personal protection order and request a hearing at any time after the personal protection order is issued.

(b) The respondent may file a motion to modify or terminate ~~the~~ an ex parte personal protection order or an ex parte order extending a personal protection order and request a hearing within 14 days after being served with, or receiving actual notice of, the order ~~unless good cause is shown for filing the motion after the 14 days have elapsed~~. Any motion otherwise to modify or terminate a personal protection order by the respondent requires a showing of good cause.

(c) The moving party shall serve the motion to modify or terminate the order and the notice of hearing at least 7 days before the hearing date as provided in MCR 2.105(A)(2) at the mailing address or addresses provided to the court. On an appropriate showing, the court may allow service in another manner as provided in MCR 2.105(I). If the moving party is a respondent who is issued a license to carry a concealed weapon and is required to carry a weapon as a condition of employment, a police officer certified by the Michigan law enforcement training council act of 1965, 1965 PA 203, MCL 28.601 to 28.616, a sheriff, a deputy sheriff or a member of the Michigan department of state police, a local corrections officer, department of corrections employee, or a federal law enforcement officer who carries a firearm during the normal course of employment, providing notice one day before the hearing is deemed as sufficient notice to the petitioner.

(2)-(3) [Unchanged.]

(B)-(D) [Unchanged.]

Staff Comment: The amendment of MCR 3.707 clarifies that the right to bring a motion to modify or terminate a personal protection order (PPO) within 14 days after the order enters applies to ex parte PPOs only, not those orders that enter following a full hearing. In addition, for a

respondent to file a motion to modify or terminate a PPO more than 14 days after its issuance, this amendment requires the respondent to show good cause.

The staff comment is not an authoritative construction by the Court.

Entered October 6, 2011 (File No. 2010-36)—REPORTER.

By order dated February 1, 2011, this Court amended Rule 3.705 of the Michigan Court Rules, effective immediately. 488 Mich cxxv (2011). At the same time, the Court stated that it would consider at a future public hearing whether to retain the amendment. Notice and an opportunity for comment at a public hearing having been provided, the amendment of MCR 3.705 is retained.

Adopted October 6, 2011, effective January 1, 2011 (File No. 2011-04)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 3.915. ASSISTANCE OF ATTORNEY.

(A) [Unchanged.]

(B) Child Protective Proceedings.

(1) Respondent.

(a) Advice and Right to Counsel. At respondent's first court appearance, the court shall advise the respondent of the right to retain an attorney to represent the respondent at any hearing conducted pursuant to these rules and that

(i) the respondent has the right to a court appointed attorney at any hearing conducted pursuant to these rules, including the preliminary hearing, if the respondent is financially unable to retain an attorney, and,

(ii) if the respondent is not represented by an attorney, the respondent may request a court-appointed attorney at any later hearing.

(b) Appointment of an Attorney. The court shall appoint an attorney to represent the respondent at any hearing, including the preliminary hearing, conducted pursuant to these rules if

(i) the respondent requests appointment of an attorney, and

(ii) it appears to the court, following an examination of the record, through written financial statements, or otherwise, that the respondent is financially unable to retain an attorney.

(c) The respondent may waive the right to the assistance of an attorney, except that the court shall not accept the waiver by a respondent who is a minor when a parent, guardian, legal custodian, or guardian ad litem objects to the waiver.

(2) [Unchanged.]

(C)-(E) [Unchanged.]

Staff Comment: The amendment of MCR 3.915 clarifies that counsel should be appointed for a parent even at the preliminary hearing of a child protective proceeding.

The staff comment is not an authoritative construction by the Court.

Adopted November 10, 2011, effective January 1, 2012 (File No. 2010-05)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 2.112. PLEADING SPECIAL MATTERS.

(A)-(L) [Unchanged.]

(M) Headlee Amendment Actions. In an action brought pursuant to Const 1963, art 9, § 32, alleging a violation of Const 1963, art 9, §§ 25-34, the pleadings shall set forth with particularity the factual basis for the alleged violation or a defense and indicate whether there are any factual questions that are anticipated to require resolution by the court ~~factual basis for the alleged violation or a defense must be stated with particularity~~. In an action involving Const 1963, art 9, § 29, the plaintiff ~~must~~ shall state with particularity the type and extent of the harm and whether there has been a violation of either the first or second sentence of that section. In an action involving the second sentence of Const 1963, art 9, § 29, the plaintiff ~~must~~ shall state with particularity the activity or service involved. The pleadings shall identify all ~~All~~ statutes involved in the case, and ~~must be identified, and~~ the parties shall append to their pleadings copies of all ordinances and municipal charter provisions involved, and any available documentary evidence supportive of a claim or defense~~, must be attached to the pleading~~. The parties may supplement their pleadings with additional documentary evidence as it becomes available to them.

(N) [Unchanged.]

RULE 2.625 TAXATION OF COSTS.

(A)-(I) [Unchanged.]

(J) Costs in Headlee Amendment Suits. A plaintiff who prevails in an action brought pursuant to Const 1963, art 9, § 32 shall receive from the defendant the costs incurred by the plaintiff in maintaining the action as authorized by MCL 600.308a(1) and (6). Costs include a reasonable attorney fee.

RULE 7.206. EXTRAORDINARY WRITS, ORIGINAL ACTIONS, AND ENFORCEMENT ACTIONS.

(A)-(C) [Unchanged.]

(D) Actions for Extraordinary Writs and Original Actions.

(1) Filing of Complaint. To commence an original action, the plaintiff shall file with the clerk:

(a) ~~for original actions filed under Const 1963, art 9, §§ 25-34, 5 copies of a complaint (one signed) that conforms to the special requirements of MCR 2.112(M), and which indicates whether there are any factual questions that must be resolved; for all other extraordinary writs and original actions,~~ 5 copies of a complaint (~~one~~1 signed), which may have copies of supporting documents or affidavits attached to each copy;

(b) 5 copies of a supporting brief (~~one~~1 signed) conforming to MCR 7.212(C) to the extent possible;

(c) proof that a copy of each of the filed documents was served on every named defendant and, in a superintending control action, on any other party involved in the case which gave rise to the complaint for superintending control; and

(d) the entry fee.

(2) Answer. The defendant or any other interested party must file with the clerk within 21 days of service of the complaint and any supporting documents or affidavits:

(a) ~~for original actions filed under Const 1963, art 9, §§ 25-34, 5 copies of an answer to the complaint (one signed) that conforms to the special requirements of MCR 2.112(M), and which indicates whether there are any factual questions that must be resolved; for all other extraordinary writs and original actions,~~ 5 copies

of an answer to the complaint (~~one~~1 signed), which may have copies of supporting documents or affidavits attached to each copy;

(b) 5 copies of an opposing brief (~~one~~1 signed) conforming to MCR 7.212(D) to the extent possible; and

(c) proof that a copy of each of the filed documents was served on the plaintiff and any other interested party.

(3) Electronic Filing. The parties may file all pleadings and other papers permitted by this rule electronically with the Court of Appeals. All electronically filed documents must be in PDF digital format, while appendices and other nonoriginal filings may be scanned. All electronic filings must be submitted in accordance with the instructions set forth on the website of the Michigan Court of Appeals. Pro se parties may file pleadings and other papers in paper form.

(~~3~~4) [Former subsection (3) has been renumbered as (4), but otherwise is unchanged.]

(E) Actions to Enforce the Headlee Amendment, Pursuant to Const 1963, art 9, § 32.

(1) Filing of Complaint. To commence an action pursuant to Const 1963, art 9, § 32, the plaintiff shall file with the clerk:

(a) 5 copies of the complaint (1 signed), which conforms with the special pleading requirements of MCR 2.112(M) and indicates, inter alia, whether there are any factual questions that are anticipated to require resolution by the court and whether the plaintiff(s) anticipate(s) the need for discovery and the development of a factual record;

(b) 5 copies of a supporting brief (1 signed) conforming to MCR 7.212(C) to the extent possible;

(c) proof that a copy of each of the filed documents was served on every named defendant and the office of the attorney general; and

(d) the entry fee.

(2) Answer. The named defendant(s) shall file with the clerk within 21 days of service of the complaint:

(a) 5 copies of an answer to the complaint (1 signed), which conforms with the special pleading requirements of MCR 2.112(M) and indicates, inter alia, whether there are any factual questions that are anticipated to require resolution by the court and whether the named defendant(s) anticipate(s) the need for discovery and the development of a factual record;

(b) 5 copies of a supporting brief (1 signed) conforming to MCR 7.212(C) to the extent possible;

(c) proof that a copy of each of the filed documents was served on every named plaintiff.

(3) Subsequent proceedings. Following receipt of the answer:

(a) the chief clerk shall promptly select a panel of the court by random draw and assign that panel to commence proceedings in the suit; and

(b) the panel of the court may deny relief or grant peremptory relief without oral argument; or

(c) if the panel of the court determines that the issues framed in the parties' pleadings and supporting briefs solely present jurisprudentially significant questions of law, the panel shall direct that the suit proceed to a full hearing on the merits in the same manner as an appeal as of right and notify the parties of the date for the filing of supplemental briefs, if such briefs are determined to be necessary, and of the date for oral argument, which shall be on an expedited basis; or

(d) if the panel of the court determines that the issues framed in the parties' pleadings and supplemental briefs present factual questions for resolution, the panel shall refer the suit to a judicial circuit for the purposes of holding pretrial proceedings, conducting a hearing to receive evidence and arguments of law, and issuing a written report for the panel setting forth proposed findings of fact and conclusions of law. The proceedings before the circuit court shall proceed as expeditiously as due consideration of the circuit court's docket, facts and issues of law requires. Following the receipt of the report from the circuit court, the panel shall notify counsel for the parties of the schedule for filing briefs in response to the circuit court's report and of the date for oral argument, which shall be on an expedited basis.

~~(E)~~(F) [Former (E) has been relettered as (F), but otherwise is unchanged.]

RULE 7.213. CALENDAR CASES.

(A)-(B) [Unchanged.]

(C) Priority on Calendar. The priority of cases on the session calendar is in accordance with the initial filing dates of the cases, except that precedence shall be given to:

(1) interlocutory criminal appeals;

(2) child custody cases;

(3) interlocutory appeals from the grant of a preliminary injunction;

(4) appeals from all cases involving election issues, including, but not limited to, recall elections and petition disputes;

(5) appeals of decisions holding that a provision of the Michigan Constitution, a Michigan statute, a rule or

regulation included in the Michigan Administrative Code, or any other action of the legislative or executive branch of state government is invalid; ~~and~~

(6) actions brought under Const 1963, art 9, §§ 29-34 (Headlee actions); and

(7) [Former (6) has been renumbered as (7), but is otherwise unchanged.]

(D)-(E) [Unchanged.]

Staff Comment: The existing fact-specific pleading requirements in MCR 2.112(M) are retained and expanded to promote earlier consideration whether facts must be established in the case. The amendments of MCR 2.625 clarify that costs, including reasonable attorney fees, are recoverable in a Headlee action. The amendment of MCR 7.206(D)(3) allows parties to utilize electronic filing in Headlee cases, as well as other extraordinary writs or original actions filed in the Court of Appeals. The amendments of MCR 7.206 create a new specific subsection (7.206[E]) regarding the procedure for filing a Headlee action as an original proceeding in the Court of Appeals. The amendment of MCR 7.213 is intended to clarify that Headlee actions are considered priority matters in the Court of Appeals.

The staff comment is not an authoritative construction by the Court.

Entered December 8, 2011 (File No. 2010-13)—REPORTER.

On order of the Court, the proposed amendment of Rule 6.001 of the Michigan Court Rules having been published for comment at 489 Mich 1246 (2011), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

Adopted December 8, 2011, effective May 1, 2012 (File No. 2010-19)—REPORTER.

[The rules in subchapter 7.100 are replaced by the rules contained in this order.]

SUBCHAPTER 7.100. APPEALS TO CIRCUIT COURT.

RULE 7.101. SCOPE OF RULES.

(A) Scope of Rules. The rules in this subchapter govern appeals to the circuit court.

(B) Rules Do Not Affect Jurisdiction. These rules do not restrict or enlarge the appellate jurisdiction of the circuit court.

RULE 7.102. DEFINITIONS.

For purposes of this subchapter:

(1) "agency" means any governmental entity other than a "trial court," the decisions of which are subject to appellate review in the circuit court;

(2) "appeal" means judicial review by the circuit court of a judgment, order, or decision of a "trial court" or "agency," even if the statute or constitutional provision authorizing circuit court appellate review uses a term other than "appeal." "Appeal" does not include actions commenced under the Freedom of Information Act, MCL 15.231 *et seq.*, proceedings described in MCR 3.302 through MCR 3.306, and motions filed under MCR 6.110(H);

(3) "appeal fee" means the fee required to be paid to the circuit court upon filing an appeal and any fee required to be paid to the "trial court" or "agency" in conjunction with the appeal;

(4) "clerk" means clerk of the court;

(5) "court" means the circuit court;

(6) "date of filing" means the date of receipt of a document by the "clerk";

(7) "entry" is as defined in MCR 7.204(A);

(8) "final judgment" or "final order" is as defined in MCR 7.202(6); and

(9) "trial court" means the district, probate, or municipal court from which the "appeal" is taken.

RULE 7.103. APPELLATE JURISDICTION OF THE CIRCUIT COURT.

(A) Appeal of Right. The circuit court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) a final judgment or final order of a district or municipal court, except a judgment based on a plea of guilty or nolo contendere;

(2) a final order of a probate court under MCR 5.801(C);

(3) a final order or decision of an agency governed by the Administrative Procedures Act, MCL 24.201 *et seq.*; and

(4) a final order or decision of an agency from which an appeal of right to the circuit court is provided by law.

(B) Appeal by Leave. The circuit court may grant leave to appeal from:

(1) a judgment or order of a trial court when

(a) no appeal of right exists, or

(b) an appeal of right could have been taken but was not timely filed;

(2) a final order or decision of an agency from which an appeal by leave to the circuit court is provided by law;

(3) an interlocutory order or decision of an agency if an appeal of right would have been available for a final order or decision and if waiting to appeal of right would not be an adequate remedy;

(4) a final order or decision of an agency if an appeal of right was not timely filed and a statute authorizes a late appeal; and

(5) a decision of the Michigan Parole Board to grant parole.

RULE 7.104. FILING APPEAL OF RIGHT.

(A) Time Requirements. The time limit for an appeal of right is jurisdictional. See MCR 7.103(A). Time is computed as provided in MCR 1.108. An appeal of right to the circuit court must be taken within:

(1) 21 days or the time allowed by statute after entry of the judgment, order, or decision appealed, or

(2) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the judgment, order, or decision, if the motion was filed within:

(a) the initial 21-day period, or

(b) further time the trial court or agency may have allowed during that 21-day period.

(3) If a criminal defendant requests appointment of an attorney within 21 days after entry of the judgment of sentence, an appeal of right must be taken within 21 days after entry of an order:

(a) appointing or denying the appointment of an attorney, or

(b) denying a timely filed motion described in subrule (2).

(B) Manner of Filing. To vest the circuit court with jurisdiction in an appeal of right, an appellant must file with the clerk of the circuit court within the time for taking an appeal:

(1) the claim of appeal, and

(2) the circuit court's appeal fee, unless the appellant is indigent.

(C) Claim of Appeal.

(1) *Form*.

(a) The caption of a claim of appeal shall comply with MCR 2.113(C)(1).

(b) In an appeal from a trial court, the claim of appeal should name the parties in the same order as they appear in the trial court, with the added designation "appellant" or "appellee."

(2) *Content.* The claim should state:

"[*name of appellant(s)*] claim[s] an appeal from the [*judgment or order*] entered on [*date*] in the [*name of trial court*] by [*name of judge*]."

(3) *Signature*. The appellant or the appellant's attorney must date and sign the claim of appeal.

(D) Other Documents. The appellant shall file the following documents with the claim of appeal:

(1) a copy of the judgment, order, or decision appealed;

(2) a copy of the certificate of the court reporter or recorder or a statement that the transcript has been ordered, pursuant to MCR 7.109(B)(3)(a). If there is nothing to be transcribed, the appellant must file a statement so indicating;

(3) in an agency appeal, a copy of a written request or order for a certified copy of the record to be sent to the circuit court;

(4) if the appellant has filed a bond, a true copy of the bond;

(5) proof that money, property, or documents have been delivered or deposited as required by law;

(6) a copy of the register of actions, if any;

(7) proof that the appeal fee of the trial court or agency has been tendered;

(8) anything else required by law to be filed; and

(9) proof that a copy of the claim of appeal and other documents required by this subrule were served on all parties, the trial court or agency, and any other person or officer entitled by law to notice of the appeal.

(E) Service Requirements in Trial Court or Agency. Within the time for taking the appeal, the appellant shall serve on the trial court or agency from which the appeal is taken:

(1) a copy of the claim of appeal;

(2) any fee required by law;

(3) any bond required by law as a condition for taking the appeal;

(4) in an agency appeal, a copy of a written request for a certified copy of the record to be sent to the circuit court; and

(5) unless there is nothing to be transcribed, the certificate of the court reporter or recorder or a statement that the transcript has been ordered and payment for it made or secured. If a statement is filed, the certificate of the court reporter or recorder must be filed within 7 days after a transcript is ordered by a party of the court.

(F) Appearance. Within 14 days after being served with the claim of appeal, the appellee shall file an appearance in the circuit court identifying the individual appellate attorneys. An appellee who does not file an appearance is not entitled to notice of further proceedings.

RULE 7.105. APPLICATION FOR LEAVE TO APPEAL.

(A) Time Requirements. An application for leave to appeal must be filed with the clerk of the circuit court within:

(1) 21 days or the time allowed by statute after entry of the judgment, order, or decision appealed, or

(2) 21 days after the entry of an order denying a motion for new trial, a motion for rehearing or reconsideration, or a motion for other relief from the judgment, order, or decision if the motion was filed within:

(a) the initial 21-day period, or

(b) such further time as the trial court or agency may have allowed during that 21-day period.

(3) If a criminal defendant, who has pled guilty or nolo contendere, requests appointment of an attorney within 21 days after entry of the judgment or sentence, an application must be filed within 21 days after entry of an order:

(a) appointing or denying the appointment of an attorney, or

(b) denying a timely filed motion described in subrule (2).

(B) Manner of Filing. To apply for leave to appeal, the appellant must file:

(1) a signed application for leave to appeal:

(a) stating the date and nature of the judgment, order, or decision appealed;

(b) concisely reciting the appellant's allegations of error and the relief sought;

(c) setting forth a concise argument in support of the appellant's position on each issue that conforms with MCR 7.212(C); and

(d) if the order appealed is interlocutory, setting forth facts showing how the appellant would suffer substantial harm by awaiting final judgment before taking an appeal;

(2) a copy of the judgment, order, or decision appealed and the opinion or findings of the trial court or agency;

(3) if the appeal is from a trial court, a copy of the register of actions;

(4) if the appeal is from an agency, a copy of the written request or order for a certified copy of the record to be sent to the circuit court;

(5) unless waived by stipulation of the parties or trial court order, a copy of certain transcripts as follows:

(a) in an appeal relating to an evidentiary hearing in a civil or criminal case, the transcript of the evidentiary hearing, including the opinion or findings of the court that conducted the hearing;

(b) in an appeal challenging jury instructions, the transcript of the entire charge to the jury;

(c) in an appeal from a judgment in a criminal case entered pursuant to a plea of guilty or nolo contendere, the transcripts of the plea and sentence;

(d) in an appeal from an order granting or denying a new trial, the portion of the transcript permitting the circuit court to determine whether the trial court's decision on the motion was for a legally recognized reason based on arguable support in the record;

(e) in an appeal raising a sentencing issue, the transcript of the sentencing proceeding and the transcript of any hearing on a motion related to sentencing;

(f) in an appeal raising any other issue, the portion of the transcript substantiating the existence of the issue, objections or lack thereof, arguments of counsel, and any comment or ruling of the trial judge; or

(g) if the transcript is not yet available, the appellant must file a copy of the certificate of the court reporter or recorder or a statement that a transcript has been

ordered, in which case the certificate of the court reporter or recorder must be filed within 7 days after a transcript is ordered by a party or the court. If there is nothing to be transcribed, the appellant must file a statement so indicating within 7 days after the transcript is ordered;

(6) proof that a copy of the application was served on all other parties and that a notice of the filing of the application was filed with the trial court or agency. If service cannot be reasonably accomplished, the appellant may ask the circuit court to prescribe service under MCR 2.107(E); and

(7) the circuit court's appeal fee, unless the appellant is indigent.

(C) Answer. Any other party in the case may file, within 21 days of service of the application:

(1) a signed answer to the application conforming to MCR 7.212(D), and

(2) proof that a copy was served on all other parties.

(D) Decision.

(1) There is no oral argument unless directed by the court.

(2) Absent good cause, the court shall decide the application within 35 days of the filing date.

(3) The court may grant or deny leave to appeal or grant other relief. The court shall promptly serve a copy of the order on the parties and the trial court or agency.

(4) If an application is granted, MCR 7.104 governs further proceedings, except that:

(a) the filing of a claim of appeal is not required,

(b) the appellant must complete the acts required by MCR 7.104(D) and (E) within 7 days after the entry of the order granting leave to appeal, and

(c) an appellee may file a claim of cross appeal within 14 days after service of the order granting leave to appeal.

(5) Unless otherwise ordered, the appeal is limited to the issues raised in the application.

(E) Immediate Consideration. When an appellant requires a decision on an application in fewer than 35 days, the appellant must file a motion for immediate consideration concisely stating why an immediate decision is required.

(F) Late Appeal.

(1) When an appeal of right or an application for leave was not timely filed, the appellant may file an application as prescribed under subrule (B) accompanied by a statement of facts explaining the delay. The answer may challenge the claimed reasons for the delay. The circuit court may consider the length of and the reasons for the delay in deciding whether to grant the application.

(2) A late application may not be filed more than 6 months after entry of:

(a) the order, judgment, or decision appealed;

(b) an order denying a motion for a new trial, a motion for rehearing or reconsideration, or a motion for other relief from the judgment, order, or decision, if the motion was timely filed; or

(c) an order denying a motion for new trial under MCR 6.610(H) or a motion to withdraw a plea under MCR 6.610(E)(7).

RULE 7.106. CROSS APPEALS.

(A) Right of Cross Appeal.

(1) Any appellee may file a cross appeal when:

(a) an appeal of right is filed, or

(b) the circuit court grants leave to appeal.

(2) If there is more than one plaintiff or defendant in a civil action and one party appeals, any other party may file a cross appeal against all or any of the other parties as well as against the party who first appealed. If the cross appeal operates against a party not affected by the first appeal or in a manner different from the first appeal, that party may file a further cross appeal.

(B) Time Requirements. A cross appeal must be filed with the clerk of the circuit court within 14 days after the claim of appeal is served on the cross appellant or the order granting leave to appeal is entered.

(C) Manner of Filing. To file a cross appeal, the cross appellant must file:

(1) a claim of cross appeal in the form required by MCR 7.104(C);

(2) any required fee;

(3) a copy of the judgment, order, or decision from which the cross appeal is taken; and

(4) proof that a copy of the claim of cross appeal was served on all parties.

(D) Additional Requirements. The cross appellant must perform the steps required by MCR 7.104(D) and (E) unless compliance with this subrule would duplicate the appellant's filing of the same document. The cross appellant is not required to order a transcript or file a court reporter's certificate, unless the initial appeal is dismissed.

(E) Dismissed Appeal. If the initial appeal is dismissed, the cross appeal may continue. If there is a transcript to be produced and the certificate of the court reporter or recorder has not been filed, the cross appel-

lant must file the certificate within 14 days after the order dismissing the appeal. If there is nothing to be transcribed, the cross appellant must file a statement so indicating within 14 days after the order dismissing the appeal.

(F) Delayed Cross Appeal. A party seeking leave to take a delayed cross appeal must proceed under MCR 7.105(F).

RULE 7.107. AUTHORITY OF TRIAL COURT OR AGENCY.

After a claim of appeal is filed or leave to appeal is granted, jurisdiction vests in the circuit court. The trial court or agency may not set aside or amend the judgment, order, or decision appealed except by circuit court order or as otherwise provided by law. In all other respects, the authority of the trial court or agency is governed by MCR 7.208(C) through (I).

RULE 7.108. STAY OF PROCEEDINGS; BOND; REVIEW.

(A) General Provisions.

(1) A motion for bond or a stay pending appeal may not be filed in the circuit court unless such a motion was decided by the trial court. The motion must include a copy of the trial court's opinion and order and a copy of the transcript of the hearing, unless its production has been waived.

(2) Except as otherwise provided by rule or law, the circuit court may amend the amount of bond, order an additional or different bond and set the amount, or require different or additional sureties. The circuit court may also remand a bond matter to the trial court. The circuit court may grant a stay of proceedings in the trial court or stay the effect or enforcement of any judgment or order of a trial court on terms the circuit court deems just.

(B) Civil Actions.

(1) *Automatic Stay.* Unless otherwise provided by rule, statute, or court order, an execution may not issue and proceedings may not be taken to enforce an order or judgment until expiration of the time for taking an appeal of right.

(2) *Effect of Appeal.* An appeal does not stay execution unless:

(a) the appellant files a bond in an amount not less than 1¼ times the amount of the judgment or order being enforced, including any costs, interest, attorney fees, and sanctions assessed to date of filing the bond. When the bond is filed, the judgment or order shall automatically be stayed pending entry of a final order under MCR 7.108(B)(4)(c) to stay enforcement of the judgment even though objections to the bond or surety may be filed, or

(b) the trial court grants a stay with or without bond under MCR 3.604(L), MCR 7.209(E)(1), or MCL 600.2605. The stay order must conform to any condition expressly required by the statute authorizing review.

(3) *Bond Form and Content.* The bond must:

(a) recite the names and designations of the parties and the judge in the trial court; identify the parties for whom and against whom judgment was entered; and state the amount of the judgment, including any costs, interest, attorney fees, and sanctions assessed;

(b) contain the promises and conditions that the appellant will:

(i) diligently file and prosecute the appeal to decision taken from the judgment or order stayed, and will perform and satisfy the judgment or order stayed if it is not set aside or reversed;

(ii) perform or satisfy the judgment or order stayed if the appeal is dismissed;

(iii) pay and satisfy any judgment or order entered and any costs assessed against the principal on the bond in the circuit court, Court of Appeals, or Supreme Court; and

(iv) do any other act which is expressly required in the statute authorizing appeal or ordered by the court;

(c) be executed by the appellant along with one or more sufficient sureties as required by MCR 3.604; and

(d) include the conditions provided in MCR 4.201(N)(4) if the appeal is from a judgment for the possession of land.

(4) *Notice of Bond; Objections; Stay Orders.*

(a) A copy of a bond and any accompanying power of attorney or affidavit must be promptly served on all parties in the manner prescribed in MCR 2.107. At the same time, the party seeking the stay shall file a proposed stay order pursuant to MCR 2.602(B)(3). Proof of service must be filed promptly with the trial court in which the bond has been filed.

(b) Objections shall be filed and served within 7 days after service of the notice of bond. Objections to the amount of the bond are governed by MCR 2.602(B)(3). Objections to the surety are governed by MCR 3.604(E).

(c) If no timely objections to the bond, surety, or stay order are filed, the trial court shall promptly enter the order staying enforcement of the judgment or order pending all appeals. Unless otherwise ordered, the stay shall continue until jurisdiction is again vested in the trial court or until further order of an appellate court.

(d) Any stay order must be promptly served on all parties in the manner prescribed in MCR 2.107. Proof of service must be filed promptly with the trial court.

(e) All hearings under this rule may be held by telephone conference as provided in MCR 2.402.

(5) For good cause shown, the trial court may set the amount of the bond in a greater or lesser amount adequate to protect the interests of the parties.

(6) A bond may be secured under MCL 600.2631.

(7) If an execution has issued, it is suspended by giving notice of filing of the bond to the officer holding the execution.

(C) Criminal Cases.

(1) *Immediate Effect.* A criminal judgment may be executed immediately even though the time for taking an appeal has not elapsed. The granting of bond and its amount are within the discretion of the trial court, subject to the applicable laws and rules on bonds pending appeals in criminal cases.

(2) *Bond Form and Content.* If a bond is granted, the defendant must promise in writing:

(a) to prosecute the appeal to decision;

(b) if the sentence is one of incarceration, to surrender immediately to the county sheriff or as otherwise directed, if the judgment of sentence is affirmed on appeal or if the appeal is dismissed;

(c) if the sentence is other than one of incarceration, to perform and comply with the judgment of sentence if it is affirmed on appeal or if the appeal is dismissed;

(d) to appear in the trial court if the case is remanded for retrial or further proceedings or if a conviction is reversed and retrial is allowed;

(e) to remain in Michigan unless the court gives written approval to leave;

(f) to notify the trial court clerk in writing of a change of address; and

(g) to comply with any other conditions imposed by law or the court.

(3) *Notice of Bond; Objections.* A criminal defendant filing a bond after conviction shall give notice to the prosecuting attorney of the time and place the bond will be filed. The bond is subject to the objection procedure provided in MCR 3.604.

(D) Civil Infractions. An appeal bond and stay in a civil infraction proceeding is governed by MCR 4.101(G)(1).

(E) Probate Actions.

(1) The probate court has continuing jurisdiction to decide other matters pertaining to the proceeding from which an appeal was filed.

(2) A stay in an appeal from the probate court is governed by MCL 600.867 and MCR 5.802(C).

RULE 7.109. RECORD ON APPEAL.

(A) Content of Record. Appeals to the circuit court are heard on the original record.

(1) *Appeal From Trial Court.* The record is as defined in MCR 7.210(A)(1).

(2) *Appeal From Agency.* The record is as defined in MCR 7.210(A)(2).

(3) *Excluded Evidence.* The record on appeal must include the substance of the excluded evidence or the transcript of proceedings in the trial court or agency excluding it. Excluded exhibits must be maintained by the party offering them.

(4) *Stipulations.* The parties may stipulate in writing regarding any matters relevant to the trial court or agency record if the stipulation is made a part of the record on appeal and sent to the circuit court.

(B) Transcript.

(1) *Appellant's Duties; Orders; Stipulations.*

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Unless otherwise provided by circuit court order or this subrule, the appellant shall order the full transcript of testimony and other proceedings in the trial court or agency. Under MCR 7.104(D)(2), a party must serve a copy of any request for transcript preparation on the opposing party and file a copy with the circuit court.

(b) In an appeal from probate court, only that portion of the transcript concerning the order appealed need be filed. The appellee may file additional portions of the transcript.

(c) On the appellant's motion, with notice to the appellee, the trial court or agency may order that no transcript or some portion less than the full transcript be included in the record on appeal. The motion must be filed within the time required for filing an appeal, and, if the motion is granted, the appellee may file any portions of the transcript omitted by the appellant.

(d) The parties may stipulate that no transcript or some portion less than the full transcript be filed.

(e) The parties may agree on a statement of facts without procuring the transcript and the statement signed by the parties may be filed with the trial court or agency and sent as the record of testimony in the action.

(2) *Transcript Unavailable.* When a transcript of the proceedings in the trial court or agency cannot be obtained, the appellant shall file a settled statement of facts using the procedure in MCR 7.210(B)(2) unless a statute provides otherwise.

(3) *Duties of Court Reporter or Recorder.*

(a) Certificate. Within 7 days after a transcript is ordered by a party or the court, the court reporter or recorder shall furnish a certificate stating that the transcript has been ordered and payment for it made or secured and that it will be filed as soon as possible or has already been filed.

(b) Time for Filing.

(i) The court reporter or recorder shall file the transcript in the trial court or agency within:

[A] 14 days after a transcript is ordered by a party or the court for an application for leave to appeal from an order granting or denying a motion to suppress evidence in a criminal case;

[B] 28 days after a transcript is ordered by a party or the court in an appeal of a criminal conviction based on a plea of guilty, guilty but mentally ill, or nolo contendere or an appeal from the dismissal or reduction of a felony charge following a preliminary examination; or

[C] 56 days after a transcript is ordered by a party or the court in all other cases.

(ii) The circuit court may extend or shorten these time limits in an appeal pending in the court on motion filed by the court reporter or recorder or a party.

(c) Copies. Additional copies of the transcripts required by the appellant may be ordered from the court reporter or recorder. Photocopies of the transcript furnished by the court reporter or recorder may also be made.

(d) Form of Transcript. The transcript must be prepared in the form provided by MCR 7.210(B)(3)(d).

(e) Notice. Immediately after the transcript is filed, the court reporter or recorder shall notify the circuit court and all parties that it has been filed and file in the circuit court an affidavit of mailing of notice to the parties.

(f) Discipline. A court reporter or recorder failing to comply with the requirements of these rules is subject to disciplinary action, including punishment for contempt of court.

(g) Responsibility When More Than One Reporter or Recorder. In a case in which portions of the transcript must be prepared by more than one reporter or recorder, the person who recorded the beginning of the proceeding is responsible for ascertaining that the entire transcript has been prepared, filing it, and giving the notice required by subrule (B)(3)(e), unless the court has designated another person.

(C) Exhibits. Unless otherwise ordered by the circuit court, trial court, or agency, the offering parties shall maintain exhibits in their possession.

(D) Reproduction of Records. The trial court or agency shall procure copies of file contents as provided in MCR 7.210(D).

(E) Record on Motion. If, before the complete record on appeal is sent to the circuit court, a party files a motion that requires the circuit court to have the record, the trial court or agency shall, on request of a party or the circuit court, send the circuit court the documents needed.

(F) Service of the Record. Within 14 days after the transcript is filed with the trial court or agency, the appellant shall serve a copy of the entire record on appeal, including the transcripts and exhibits in his or her possession, on each appellee. However, copies of documents the appellee already possesses need not be served. On request, the appellant shall make available to the appellee exhibits incapable of being copied. Proof that the record was served must be promptly filed with the circuit court and the trial court or agency. If the filing of a transcript has been excused as provided in

subrule (B), the record shall be served within 14 days after the filing of the transcript substitute.

(G) Transmission of Record.

(1) Within 14 days after the complete transcript has been filed or a certified copy of the record has been requested, the trial court or agency shall promptly send the record to the circuit court, except for those things omitted by written stipulation of the parties. The trial court may order removal of exhibits, if any, from the record. Weapons, drugs, or money are not to be sent unless requested by the circuit court. The trial court or agency shall append a certificate identifying the name of the case, listing the papers with reasonable definiteness, and indicating that the required fees have been paid and any required bond filed. The record transmitted shall include:

(a) a register of actions in the case;

(b) any exhibits on file;

(c) all documents and papers from the court file;

(d) all transcripts;

(e) all opinions, findings, and orders of the trial court or agency; and

(f) the order or judgment appealed.

(2) Transcripts and all other documents which are part of the record on appeal must be attached in one or more file folders or other suitable hard-surfaced binders showing the name of the trial court or agency, the title of the case, and the file number.

(3) The circuit court must immediately send written notice to the parties when the record is filed in the circuit court.

(H) Return of Record. After deciding the appeal, the circuit court shall promptly send the original record with a certified copy of its order and any written opinion

(1) to the clerk of the Court of Appeals if a timely application for leave to appeal is filed in the Court of Appeals, or

(2) to the clerk of the trial court or agency from which the record was received if no timely application for leave to appeal is filed in the Court of Appeals.

(I) Notice of Return of Record. The trial court or agency clerk shall promptly notify all parties of the return of the record.

RULE 7.110. MOTIONS IN CIRCUIT COURT APPEALS.

Motion practice in a circuit court appeal is governed by MCR 2.119. Motions may include special motions identified in MCR 7.211(C). Absent good cause, the court shall decide motions within 28 days after the hearing date.

RULE 7.111. BRIEFS.

(A) Time for Filing and Service.

(1) *Appellant's Brief.*

(a) Within 28 days after the circuit court provides written notice under MCR 7.109(G)(3) that the record on appeal is filed with the circuit court, the appellant must file a brief conforming to MCR 7.212(C) and serve it on all other parties to the appeal. The time may be extended for 14 days by stipulation and order. The circuit court may extend the time on motion. The filing of a motion does not stay the time for filing a brief.

(b) If an appellant does not file a brief within the time provided by subrule (A)(1)(a), the appeal may be considered abandoned, and the circuit court may dismiss the appeal on 14 days' notice to the parties. Compliance with subrule (A)(1)(a) after notice is sent does not

preclude a dismissal of the appeal unless the appellant shows a reasonable excuse for the late filing.

(2) *Appellee's Brief.* Within 21 days after the appellant's brief is served on the appellee, the appellee may file a brief. The brief must conform to MCR 7.212(D) and must be served on all other parties to the appeal. The time may be extended for 14 days by stipulation and order. The circuit court may extend the time on motion. The filing of the motion does not stay the time for filing a brief.

(3) *Briefs in Cross Appeals.* The filing and service of briefs by a cross appellant and a cross appellee are governed by subrules (A)(1) and (2).

(4) *Earlier Filing and Service.* For good cause shown, the circuit court may grant a motion to shorten the time for filing and serving briefs.

(5) *Late Filing.* Any party failing to timely file and serve a brief under these rules forfeits oral argument. For good cause shown, the court may grant a motion to reinstate oral argument.

(B) Length and Form of Briefs. The appellant's brief must comply with MCR 7.212(B) and (C), and the appellee's brief must comply with MCR 7.212(B) and (D).

(C) Request for Oral Argument. A party filing a timely brief is entitled to oral argument by writing "ORAL ARGUMENT REQUESTED" in capital letters or boldface type on the title page of the brief.

(D) Nonconforming Briefs. If, on its own initiative or on a party's motion, the circuit court concludes that a brief does not substantially comply with the requirements in this rule, it may order the party filing the brief to correct the deficiencies within a specified time or it may strike the nonconforming brief.

RULE 7.112. MISCELLANEOUS RELIEF.

In addition to its general appellate powers, the circuit court may grant relief as provided in MCR 7.216.

RULE 7.113. DISMISSAL.

(A) Involuntary Dismissal.

(1) *Dismissal*. If the appellant fails to pursue the appeal in conformity with the court rules, the circuit court will notify the parties that the appeal shall be dismissed unless the deficiency is remedied within 14 days after service of the notice.

(2) *Reinstatement*. Within 14 days after the date of the dismissal order, the appellant may move for reinstatement by showing mistake, inadvertence, or excusable neglect.

(B) Voluntary Dismissal. In all cases where the parties file a signed stipulation agreeing to dismiss the appeal or the appellant files an unopposed motion to withdraw the appeal, the circuit court shall enter an order of dismissal.

(C) Notice of Dismissal. Immediately upon entry, a copy of an order dismissing an appeal must be sent to the parties and the trial court or agency.

RULE 7.114. ORAL ARGUMENT; DECISION AND EFFECT OF JUDGMENT, RECONSIDERATION.

(A) Oral Argument. If requested in accord with MCR 7.111(C), the court shall schedule oral argument unless it concludes that the briefs and record adequately present the facts and legal arguments, and the court's deliberation would not be significantly aided by oral argument.

(B) Decision. The circuit court shall decide the appeal by oral or written opinion and issue an order. The court's order is its judgment.

(C) Effect of Judgment. Unless otherwise ordered by the circuit court or the Court of Appeals, a judgment is effective after expiration of the period for filing a timely application for leave to appeal or, if such an application is filed, after the Court of Appeals decides the case. Enforcement is to be obtained in the trial court or agency after the record is returned as provided in MCR 7.109(H).

(D) Reconsideration. A motion for reconsideration is governed by MCR 2.119(F).

RULE 7.115. TAXATION OF COSTS, FEES.

(A) Right to Costs. Except as the circuit court otherwise directs, the prevailing party in a civil case is entitled to costs.

(B) Time for Filing. Within 28 days after the dispositive order, opinion, or order denying rehearing is mailed, the prevailing party may file a certified or verified bill of costs with the clerk and serve a copy on all other parties. Each item claimed in the bill must be specified. Failure to file a bill of costs within the time prescribed waives the right to costs.

(C) Objections. Any other party may file objections to the bill of costs with the clerk within 7 days after a copy of the bill is served. The objecting party must serve a copy of the objections on the prevailing party and file proof of that service.

(D) Taxation. The clerk will promptly verify the bill and tax those costs available.

(E) Review. The action by the clerk will be reviewed by the circuit court on motion of either party filed within 7 days from the date of taxation, but on review only those affidavits or objections that were previously filed with the clerk may be considered by the court.

(F) Taxable Costs and Fees. A prevailing party may tax only the reasonable costs and fees incurred in the appeal, including:

(1) printing of briefs, or if briefs were typewritten, a charge of $1 per original page;

(2) obtaining any stay bond;

(3) the transcript and necessary copies of it;

(4) documents required for the record on appeal;

(5) fees paid to the clerk or to the trial court clerk incident to the appeal;

(6) taxable costs and fees allowed by law in appeals under MCL 600.2441;

(7) the additional costs incurred when a party to an appeal under the Administrative Procedures Act unreasonably refused to stipulate to shortening the record as provided in MCL 24.304(2); and

(8) other expenses taxable under applicable court rules or statutes.

RULE 7.116. APPEALS UNDER THE MICHIGAN EMPLOYMENT SECURITY ACT.

(A) Scope. This rule governs appeals to the circuit court under the Michigan Employment Security Act, MCL 421.1 *et seq*. Unless this rule provides otherwise, MCR 7.101 through 7.115 apply.

(B) Time Requirements. An appeal of right from an order or decision of the Michigan Employment Security Board of Review must be taken within 30 days after the mailing of the board's decision.

(C) Manner of Filing. Except as provided in subrule (B), the claim of appeal shall conform with MCR 7.104 and must include statements of jurisdiction and venue. In addition, proof that the claim of appeal was served on

the board of review and all interested parties must be filed in the circuit court. The Michigan Employment Security Commission is a party to any appeal under MCL 421.38(3), but the board of review is not a party to the appeal.

(D) Venue. Venue is determined under MCL 421.38(1).

(E) Appearance of Appellee. Within 14 days after service of the claim of appeal, the appellee must file an appearance in the circuit court.

(F) Record on Appeal. Within 42 days after the claim of appeal is served on the board of review, or within further time as the circuit court allows, the board of review must transmit to the clerk of the circuit court a certified copy of the record of proceedings before the referee and the board of review. The certified record must comply with MCL 421.36(3). The board of review must notify the parties that the record was transmitted.

(G) Standard of Review and Decision on Appeal. Under MCL 421.38, the circuit court may reverse an order or decision of the board of review only if it finds that the order or decision is contrary to law or is not supported by competent, material, and substantial evidence on the whole record. In all other respects, MCR 7.115 applies.

RULE 7.117. APPEALS FROM THE MICHIGAN CIVIL SERVICE COMMISSION.

(A) Scope. This rule governs appeals to the circuit court from the Michigan Civil Service Commission. Unless this rule provides otherwise, MCR 7.101 through 7.115 apply.

(B) Procedure. An appeal from a decision of the Michigan Civil Service Commission must comply with MCR 7.119.

(C) Commission as Party. An appeal challenging any decision, rule, or regulation of the Michigan Civil Service Commission must name the commission as a party and must serve the commission at the Office of the State Personnel Director in Lansing, Michigan.

RULE 7.118. APPEALS FROM THE MICHIGAN PAROLE BOARD.

(A) Scope. This rule governs appeals to the circuit court from the Michigan Parole Board. Unless this rule provides otherwise, MCR 7.101 through 7.115 apply.

(B) No Appeal of Right. There is no appeal of right from a decision of the parole board.

(C) Access to Reports and Guidelines. Upon request, the prosecutor, the victim, and the prisoner shall receive the parole eligibility report, any prior parole eligibility reports that are mentioned in the parole board's decision, and any parole guidelines that support the action taken.

(D) Application for Leave to Appeal.

(1) *Parties*.

(a) Only the prosecutor or a victim may file an application for leave to appeal.

(b) The prisoner shall be the appellee.

(c) The parole board may move to intervene as an appellee.

(2) *Time Requirements*. An application for leave to appeal must be filed within 28 days after the parole board mails a notice of action granting parole and a copy of any written opinion to the prosecutor and the victim, if the victim requested notification under MCL 780.771.

(3) *Manner of Filing*. An application for leave must comply with MCR 7.105, must include statements of jurisdiction and venue, and must be served on the

parole board and the prisoner. If the victim seeks leave, the prosecutor must be served. If the prosecutor seeks leave, the victim must be served if the victim requested notification under MCL 780.771.

(a) Service on the parole board, the victim, or the prosecutor must be accomplished by certified mail, return receipt requested, in compliance with MCR 2.105(A)(2).

(b) Service on a prisoner incarcerated in a state correctional facility must be accomplished by serving the application for leave on the warden or administrator, along with the form approved by the State Court Administrative Office for personal service on a prisoner. Otherwise, service must be accomplished by certified mail, return receipt requested, as described in MCR 2.103(C) and MCR 2.104(A)(2) or in compliance with MCR 2.105(A)(2). In addition to the pleadings, service on the prisoner must also include a notice in a form approved by the State Court Administrative Office advising the prisoner that:

(i) the prisoner may respond to the application for leave to appeal through retained counsel or in propria persona, although no response is required, and

(ii) if an order of parole is issued under MCL 791.236 before the completion of appellate proceedings, a stay may be granted in the manner provided by MCR 7.108, except that no bond is required.

(c) Proof of service must be promptly filed with the clerk of the circuit court and must include a copy of the return receipt and, in the case of the prisoner, a copy of the certificate of service executed by the appropriate prison official.

(4) *Venue.* An application for leave to appeal a decision of the parole board may only be filed in the circuit court of the sentencing county under MCL 791.234(9).

(E) Late Application. A late application for leave to appeal may be filed under MCR 7.105(F).

(F) Stay of Order of Parole.

(1) An order of parole issued under MCL 791.236 shall not be executed until 28 days after the mailing of the notice of action.

(2) If an order is issued under MCL 791.235 before completion of appellate proceedings, a stay may be granted in the manner provided by MCR 7.108, except that no bond is required.

(G) Decision to Grant Leave to Appeal.

(1) The circuit court shall make its determination within 28 days after the application for leave to appeal is filed.

(2) If the court does not make its determination within 28 days, the court shall enter an order to produce the prisoner before the court for a show cause hearing to determine whether the prisoner shall be released on parole pending disposition of the appeal.

(H) Procedure After Leave to Appeal Granted. If leave to appeal is granted, MCR 7.105(D)(4) applies along with the following:

(1) *Record on Appeal.*

(a) The record on appeal shall consist of the prisoner's central office file at the Department of Corrections and any other documents considered by the parole board in reaching its decision.

(b) Within 14 days after being served with an order granting leave to appeal, the parole board shall send copies of the record to the circuit court and the other parties. In all other respects, the record on appeal shall be processed in compliance with MCR 7.109.

(c) The expense of preparing and serving the record on appeal may be taxed as costs to a nonprevailing appellant, except that expenses may not be taxed to an indigent party.

(2) *Briefs*. Briefs must comply with MCR 7.111, except:

(a) the appellant's brief is due 28 days after the record is served on the parties, and

(b) the appellee's brief, if filed, is due 21 days after the appellant's brief is served on the appellee.

(3) *Burden of Proof.* The appellant has the burden of establishing that the decision of the parole board was

(a) in violation of the Michigan Constitution, a statute, an administrative rule, or a written agency regulation that is exempted from promulgation pursuant to MCL 24.207, or

(b) a clear abuse of discretion.

(4) *Remand to the Parole Board*. On motion by a party or on the court's own motion, the court may remand the matter to the parole board for an explanation of its decision.

(a) The parole board shall hear and decide the matter within 28 days of the date of the order, unless the board determines that an adjournment is necessary to obtain evidence or there is other good cause for an adjournment.

(b) The time for filing briefs on appeal under subrule (G)(2) is tolled while the matter is pending on remand.

(I) Subsequent Appeal to the Court of Appeals. An appeal of a circuit court decision is by emergency application for leave to appeal to the Court of Appeals under MCR 7.205(E), and the Court of Appeals shall expedite the matter.

(J) Parole Board Responsibility After Reversal or Remand.

(1) If a decision of the parole board is reversed or remanded, the board shall review the matter and take action consistent with the circuit court's decision within 28 days.

(2) If the circuit court order requires the board to undertake further review of the file or to reevaluate its prior decision, the board shall provide the parties with an opportunity to be heard.

(3) An appeal to the Court of Appeals does not affect the board's jurisdiction to act under this subsection.

RULE 7.119. APPEALS FROM AGENCIES GOVERNED BY THE ADMINISTRATIVE PROCEDURES ACT.

(A) Scope. This rule governs an appeal to the circuit court from an agency decision where MCL 24.201 *et seq*. applies. Unless this rule provides otherwise, MCR 7.101 through MCR 7.115 apply.

(B) Appeal of Right.

(1) *Time Requirements*. Judicial review of a final decision or order shall be by filing a claim of appeal in the circuit court within 60 days after the date of mailing of the notice of the agency's final decision or order. If a rehearing before the agency is timely requested, then the claim of appeal must be filed within 60 days after delivery or mailing of the notice of the agency's decision or order on rehearing, as provided in the statute or constitutional provision authorizing appellate review.

(2) *Manner of Filing*.

(a) Claim of Appeal — Form. The claim of appeal shall conform with the requirements of MCR 7.104(C)(1), except that:

(i) the party aggrieved by the agency decision is the appellant and is listed first in the caption; and

(ii) the party seeking to sustain the agency's decision is the appellee; or

(iii) if there is no appellee, then the caption may read "In re [*name of appellant or other identification of the subject of the appeal*]," followed by the designation of the appellant. Except where otherwise provided by law, the agency or another party to the case may become an appellee by filing an appearance within 21 days after service of the claim of appeal.

(b) Claim of Appeal — Content. The claim of appeal must:

(i) state "[*Name of appellant*] claims an appeal from the decision entered on [*date*] by [*name of the agency*]," and

(ii) include concise statements of the following:

[A] the statute, rule, or other authority enabling the agency to conduct the proceedings;

[B] the statute or constitutional provision authorizing appellate review of the agency's decision or order in the circuit court; and

[C] the facts on which venue is based under MCL 24.303(1).

(c) Signature. The claim of appeal must be signed as stated in MCR 7.104(C)(3).

(d) Other Documents. In addition to the claim of appeal, the appellant shall also comply with MCR 7.104(D).

(e) Filing Requirements in the Agency. The appellant must comply with MCR 7.104(E).

(f) Service. In addition to the service requirements found in MCR 7.104(D)(7), the appellant must also serve the Attorney General.

(3) *Appearance.* The appellee shall file an appearance that complies with MCR 7.104(F) within 14 days after service of the claim of appeal.

(C) Application for Interlocutory Appeal. A preliminary procedural or intermediate agency action or ruling is not immediately reviewable, except that a court may grant interlocutory appeal of a preliminary, procedural, or intermediate decision by an agency only on a showing that review of the final decision would not be an adequate remedy.

(1) *Time Requirements*. An application for interlocutory appeal must be filed with the court within 14 days of the decision.

(2) *Manner of Filing.* In addition to the requirements of MCR 7.105(B), the application must:

(a) include a jurisdictional statement citing:

(i) the statute, rule, or other authority enabling the agency to conduct proceedings, and

(ii) the statute or constitutional provision authorizing appellate review of the agency's decision or order in the circuit court;

(b) include a statement of venue with supporting facts;

(c) set forth why review of the agency's final decision will not be an adequate remedy; and

(d) state the relief sought.

(3) *Answer.* An appellee may file an answer to an application for interlocutory appeal under MCR 7.105(C). The circuit court may require the filing of an answer.

(4) *If Application is Granted.* If the application is granted, the appeal proceeds in the same manner as an appeal of right.

(D) Late Appeal. The appellant may file an application for late appeal if permitted by statute.

(1) *Time Requirements.* Unless inconsistent with the statute authorizing the appeal, the application must be filed within six months after entry of the agency decision or order.

(2) *Manner of Filing.* In addition to the requirements of MCR 7.105(B), the application must include:

(a) a statement citing the statute authorizing a late appeal;

(b) a statement of facts explaining the delay; and

(c) include statements of jurisdiction and venue complying with subrules (C)(2)(b) and (c).

(3) *Answer*. An appellee may file an answer to the application for late appeal under MCR 7.105(C). The circuit court may require the filing of an answer.

(4) *If Application is Granted.* If the application is granted, the appeal proceeds in the same manner as an appeal of right.

(E) Stay of Enforcement. The filing of an appeal does not stay enforcement of the agency's decision or order.

(1) A party may file a motion seeking a stay in the circuit court.

(2) For purposes of this subrule, the agency is entitled to notice even if it has not filed an appearance in the appeal.

(3) The court may order a stay on appropriate terms and conditions if it finds that:

(a) the moving party will suffer irreparable injury if a stay is not granted;

(b) the moving party made a strong showing that it is likely to prevail on the merits;

(c) the public interest will not be harmed if a stay is granted; and

(d) the harm to the moving party in the absence of a stay outweighs the harm to the other parties to the proceedings if a stay is granted.

(4) If the motion for stay is granted, the circuit court may set appropriate terms and conditions for the posting of a bond

(a) in the amount required by any applicable statute authorizing the appeal, or

(b) in an amount and with sureties that the circuit court deems adequate to protect the public and the parties when there are no statutory instructions.

(5) *Temporary Stay.*

(a) The circuit court may grant a temporary stay of enforcement without written notice only if

(i) it clearly appears from facts alleged in the motion that immediate and irreparable injury will result if a stay is not entered before a hearing, and

(ii) the moving party certifies to the court in writing that it made reasonable efforts to contact the other parties and agency, but was unsuccessful.

(b) A temporary stay may be granted by the court until a hearing can be held. A hearing on a motion to dissolve a temporary stay will be heard on 24 hours' notice, or less on order of the court for good cause shown, and takes precedence over all matters except previously filed matters of the same character.

(F) Stipulations. The parties may stipulate regarding any issue on appeal or any part of the record on appeal if the stipulation is embodied in an order entered by the court.

(G) Additional Evidence. A motion to present proofs of alleged irregularity in procedure before the agency, or to allow the taking of additional evidence before the agency, is timely only if it is filed with or included with the claim of appeal or application. The appellant shall promptly notice the motion for decision. If the court orders the taking of additional evidence, the time for filing briefs is stayed until the taking of the evidence is completed.

(H) Decision. The court may affirm, reverse, remand, or modify the decision of the agency and may grant further relief as appropriate based on the record, findings, and conclusions.

(1) If the agency's decision or order is not supported by competent, material, and substantial evidence on the whole record, the court shall specifically identify the finding or findings that lack support.

(2) If the agency's decision or order violates the Constitution or a statute, is affected by a material error of law, or is affected by an unlawful procedure resulting in material prejudice to a party, the court shall specifically identify the agency's conclusions of law that are being reversed.

RULE 7.120. LICENSING APPEALS UNDER THE MICHIGAN VEHICLE CODE.

(A) Scope. This rule governs appeals to the circuit court under the Michigan Vehicle Code, MCL 257.1 *et seq*., from a final determination by the Secretary of State pertaining to an operator's license, a chauffeur's license, a vehicle group designation, or an indorsement. Unless this rule provides otherwise, MCR 7.101 through 7.115 apply.

(B) Appeal of Right.

(1) *Time Requirements.* The time for filing an appeal of right is governed by MCL 257.323(1).

(2) *Manner of Filing*.

(a) Claim of Appeal — Form. The claim of appeal shall conform to the requirements of MCR 7.104(C)(1), except that the party aggrieved by the Secretary of State's determination is the appellant.

(b) Claim of Appeal — Content. The claim of appeal must:

(i) state the appellant's full name, current address, birth date, and driver's license number;

(ii) state "[*name of appellant*] claims an appeal from the decision on [*date*] by the Secretary of State"; and

(iii) include concise statements of the following:

[A] the nature of any determination by the Secretary of State;

[B] the statute authorizing the Secretary of State's determination;

[C] the subsection of MCL 257.323 under which the appeal is taken; and

[D] the facts on which venue is based.

(c) Signature. The claim of appeal must be signed as stated in MCR 7.104(C)(3).

(d) Other Documents. The appellant must attach as exhibits accompanying the claim of appeal:

(i) a copy of the Secretary of State's determination, and

(ii) any affidavits supporting the claim of appeal.

(e) Service. The appellant shall serve the claim of appeal on all parties.

(3) *Appearance*. The appellee shall file an appearance within 14 days that complies with MCR 7.104(F).

(C) Application for Late Appeal.

(1) *Time Requirements*. An application for late appeal must be filed within the time set forth in MCL 257.323(1).

(2) *Manner of Filing*. In addition to the requirements of MCR 7.105(B), the application must comply with MCR 7.120(B)(2)(b) and must include a statement showing good cause for the delay.

(3) *Answer*. An appellee may file an answer to the application for late appeal under MCR 7.105(C). The circuit court may require the filing of an answer.

(4) *If Application is Granted*. If the application is granted, the appeal proceeds in the same manner as an appeal of right.

(D) Stay of Enforcement. The filing of a claim of appeal or an application for late appeal does not stay enforcement of the Secretary of State's decision or order. The appellant may file for a stay of enforcement under MCL 257.323a. The appellant shall serve a copy of the order granting or denying the stay on the Secretary of State. The Secretary of State may file a motion challenging the stay.

(E) Stipulations. The parties may stipulate regarding any issue on appeal or any part of the record on appeal if the stipulation is embodied in an order entered by the court.

(F) Proceedings Under MCL 257.323(3).

(1) *Briefs*. The court may require briefs and may enter an order setting a briefing schedule. Unless otherwise ordered, briefs must comply with MCR 7.111.

(2) *Hearing*. The court shall schedule a hearing under MCL 257.323(2). During the hearing, the court may take testimony and examine all the facts and circumstances relating to the denial, suspension, or restriction of the person's license under MCL 257.303(1)(d), MCL 257.320,

MCL 257.904(10), MCL 257.904(11), MCL 257.310d, or for a first violation of MCL 257.625f.

(3) *Decision*. For denials, suspensions, or restrictions of the person's license under MCL 257.303(1)(d), MCL 257.320, MCL 257.904(10), MCL 257.904(11), MCL 257.310d, or for a first violation of MCL 257.625f, the circuit court may affirm, modify, or set aside the restriction, suspension, or denial. The circuit court, however, shall not order the Secretary of State to issue a restricted or unrestricted chauffeur's license that would permit the person to drive a commercial motor vehicle that hauls hazardous materials.

(4) *Appellant's Responsibility After Decision*. Pursuant to MCL 257.323(3), the appellant shall file a certified copy of the circuit court's order with the Secretary of State's office in Lansing within 7 days after entry of the order for denials, suspensions, or restrictions of the person's license arising under MCL 257.303(1)(d), MCL 257.320, MCL 257.904(10), MCL 257.904(11), MCL 257.310d, or for a first violation of MCL 257.625f.

(G) Proceedings Under MCL 257.323(4).

(1) *Briefs*. Unless otherwise ordered, the parties must file briefs complying with MCR 7.111.

(2) *Oral Argument*. If requested in accord with MCR 7.111(C), the court shall schedule oral argument unless it concludes that the briefs and record adequately present the facts and legal arguments, and the court's deliberation would not be significantly aided by oral argument.

(3) *Decision*. The court shall confine its consideration to a review of the record prepared under MCL 257.322, MCL 257.625f, or MCL 257.204a for statutory legal issues and shall not grant restricted driving privileges. The court shall set aside the Secretary of State's deter-

mination only if the appellant's substantial rights have been prejudiced because the determination is:

(a) in violation of the Constitution of the United States, the Michigan Constitution, or a statute;

(b) in excess of the Secretary of State's statutory authority or jurisdiction;

(c) made upon unlawful procedure that results in material prejudice to the appellant;

(d) not supported by competent, material, and substantial evidence on the whole record;

(e) arbitrary, capricious, or clearly an abuse or unwarranted exercise of discretion; or

(f) affected by other substantial and material error of law.

RULE 7.121. APPEALS FROM CONCEALED WEAPON LICENSING BOARDS.

(A) Scope. This rule governs appeals to the circuit court from a final determination of a concealed weapon licensing board refusing to restore rights under MCL 28.424 or denying, failing to issue, revoking, or suspending a license to carry a concealed pistol. Unless this rule provides otherwise, MCR 7.101 through MCR 7.115 apply.

(B) Appeal of Right.

(1) *Time Requirements.* Time requirements are governed by MCR 7.104(A).

(2) *Manner of Filing.*

(a) Claim of Appeal — Form. The claim of appeal shall conform with the requirements of MCR 7.104(C)(1), except that:

(i) the license applicant is the appellant, and

(ii) the board is the appellee.

(b) Claim of Appeal — Content. The claim of appeal must:

(i) state:

[A] "[*Name of appellant*] claims an appeal from the decision on [*date*] by [*name of the county*] Concealed Weapon Licensing Board," or

[B] "[*Name of appellant*] claims an appeal from the failure of the [*name of the county*] Concealed Weapon Licensing Board to issue a decision on the application for a license by [*date*]," and

(ii) include concise statements of the following:

[A] the nature of the proceedings before the board, including citation to the statute authorizing the board's decision;

[B] citation to the statute or Const 1963, art 6 § 28 authorizing appellate review;

[C] the facts on which venue is based.

(c) Signature. The claim of appeal must be signed as stated in MCR 7.104(C)(3).

(d) Other Documents. In addition to the documents required under MCR 7.104(D), the claim of appeal shall include a copy of the board's decision and any materials accompanying the board's decision. If the appeal is from the board's failure to issue a timely decision, the claim of appeal shall state the date on which the application was filed and shall include a statement addressing whether the application complied with MCL 28.425b(1), (5), and (9).

(e) Service. The appellant shall serve the claim of appeal on all parties.

(f) Request for Certified Record. Within the time for filing a claim of appeal, the appellant shall send a

written request to the board to send a certified copy of the record to the circuit court.

(3) *Appearance*. The appellee shall file an appearance that complies with MCR 7.104(F) within 14 days after service of the claim of appeal.

(C) Hearing De Novo from Denial of License for Grounds Specified in MCL 28.425b(7)(n).

(1) *Briefs*. The court may require briefs and may enter an order setting a briefing schedule. Unless otherwise ordered, briefs must comply with MCR 7.111.

(2) *Hearing*. The court shall hold a hearing de novo that comports with MCL 28.425d(1). Any determination that the appellant is unfit under MCL 28.425b(7)(n) shall be based on clear and convincing evidence.

(3) *Decision*. The circuit court shall enter an order either affirming the board's denial or finding the applicant qualified under MCL 28.425b(7)(n) and ordering the board to issue a license.

(D) Procedure in All Other Appeals.

(1) *Briefs*. Unless otherwise ordered, the parties must file briefs complying with MCR 7.111.

(2) *Oral Argument*. If requested in accord with MCR 7.111(C), the court shall hold oral argument within 14 days after the appellee's brief was filed or due. The court may dispense with oral argument under MCR 7.115(A).

(3) *Decision*. The court shall confine its consideration to a review of the record. If the court determines that the denial of a license was clearly erroneous, the court shall order the board to issue a license as required by the act. If the court determines that the board erroneously refused to restore rights pursuant to MCL 28.424(3), the court shall order the board to restore the

applicant's rights. If the court determines that the board erroneously revoked or suspended a license, the court shall order the board to reinstate the license. If the court determines that the board failed to issue a license pursuant to MCL 28.425b(13), the court shall order the board to act on the application within 14 days. The court shall retain jurisdiction to review the board's decision.

(E) Notice of Decision. The circuit court shall serve the parties with a copy of its order resolving the appeal.

(F) Costs and Attorney Fees.

(1) *Arbitrary and Capricious Board Decision*. If the court determines that the decision of the board to deny issuance of a license to an applicant was arbitrary and capricious, the court shall order the state to pay 1/3 and the county in which the concealed weapon licensing board is located to pay 2/3 of the actual costs and actual attorney fees of the applicant in appealing the denial.

(2) *Frivolous Appeal*. If the court determines that an applicant's appeal was frivolous, the court shall order the applicant to pay the actual costs and actual attorney fees of the board in responding to the appeal.

RULE 7.122. APPEALS FROM ZONING ORDINANCE DETERMINATIONS.

(A) Scope.

(1) This rule governs appeals to the circuit court from a determination under a zoning ordinance by any officer, agency, board, commission, or zoning board of appeals, and by any legislative body of a city, village, township, or county authorized to enact zoning ordinances. Unless this rule provides otherwise, MCR 7.101 through MCR 7.115 apply. This rule does not

apply to legislative decisions of a city, village, township, or county, such as the adoption of or amendment to a zoning ordinance.

(2) This rule does not restrict the right of a party to bring a complaint for relief relating to a determination under a zoning ordinance. A party may seek a stay of enforcement under MCR 7.123(E).

(3) An appeal under this section is an appeal of right.

(B) Time Requirements. An appeal under this rule must be filed within the time prescribed by the statute applicable to the appeal. If no time is specified in the applicable statute, the appeal must be filed within 30 days after the certification of the minutes of the board or commission from which the appeal is taken or within 30 days after the board or commission issued its decision in writing, whichever deadline comes first.

(C) Manner of Filing.

(1) *Claim of Appeal — Form*. The claim of appeal shall conform to the requirements of MCR 7.104(C)(1), except that:

(a) the party aggrieved by the determination shall be designated the appellant; and

(b) the city, village, township, or county under whose ordinance the determination was made shall be designated the "appellee," except that when a city, village, township, county, or an officer or entity authorized to appeal on its behalf, appeals a determination as an aggrieved party, then the appellee(s) shall be designated as the board, commission, or other entity that made the determination and the party that prevailed before the board, commission, or other entity that made the determination.

(2) *Claim of Appeal — Content*. The claim of appeal must:

(a) state "[*Name of appellant*] claims an appeal from the decision on [*date*] by [*name of the officer or entity*]"; and

(b) include concise statements of the following:

(i) the nature of the determination by the officer or entity;

(ii) the statute authorizing the officer or entity's proceedings and determination;

(iii) the statute or constitutional provision under which the appeal is taken;

(iv) the facts on which venue is based;

(v) the grounds on which relief is sought, stated in as many separate paragraphs as there are separate grounds alleged; and

(vi) the relief sought.

(3) *Signature*. The claim of appeal must be signed as stated in MCR 7.104(C)(3).

(4) *Other Documents*. The appellant must attach to the claim of appeal a copy of the order and/or minutes of the officer or entity from which the appeal is taken or must indicate that there is no such document to attach.

(5) *Service*. Upon filing the claim of appeal, the appellant, shall serve a copy of the claim of appeal and all attachments upon the clerk of the city, village, township, or county as well as the board, commission, or other entity that made a determination that is the subject of the appeal. Service shall be in the manner provided in MCR 2.107, and appellant shall promptly file a proof of service with the court.

(D) Bond. An appellant shall not be required to post a bond unless so ordered by the court.

(E) Record on Appeal; Transmittal of the Record.

(1) The record includes the original or a copy certified by the city, village, township, or county clerk of the application, all documents and material submitted by any person or entity with respect to the application, the minutes of all proceedings, and any determination of the officer or entity.

(2) Within 28 days after service of the claim of appeal, the clerk of the city, village, township, or county from which the appeal is taken must file the record with the court.

(3) If the record is not available within 28 days after service of the claim of appeal, the clerk of the city, village, township, or county from which the appeal is taken shall notify the court of the estimated date of transmittal of the record.

(4) If the clerk of the city, village, township, or county postpones transmittal of the record or transmittal is otherwise delayed, the court may on motion or its own initiative exercise superintending control over the clerk to prevent delay.

(5) The clerk of the city, village, township, or county from which the appeal is taken must notify the appellant and appellee of the transmittal of the record to the court.

(6) Motions regarding the contents of the record or to prepare a transcript of proceedings before the officer or entity must be filed within 21 days after transmission of the record to the court.

(F) Briefs. Unless otherwise ordered, the parties must file briefs complying with MCR 7.111.

(G) Decision.

(1) *Appeals Under MCL 125.3606.*

(a) In an appeal from a city, village, township, or county board of zoning appeals, the court shall apply the standard of review under MCL 125.3606(1).

(b) If the court finds the record inadequate to review the decision or finds that additional material evidence exists that with good reason was not presented, the court shall order further zoning board of appeals proceedings on conditions that the court considers proper. The zoning board of appeals may modify the findings and decision as a result of the new proceedings or may affirm the original decision. The supplementary record and decision shall be filed with the court.

(c) The court may affirm, reverse, or modify the decision of the board of appeals.

(2) *Other Appeals*. In an appeal from a final determination under a zoning ordinance where no right of appeal to a zoning board of appeals exists, the court shall determine whether the decision was authorized by law and the findings were supported by competent, material, and substantial evidence on the whole record.

(H) Notice of Decision. The court shall serve the parties with a copy of its order resolving the appeal.

RULE 7.123. APPEALS FROM AGENCIES NOT GOVERNED BY ANOTHER RULE.

(A) Scope. This rule governs an appeal to the circuit court from an agency decision that is not governed by another rule in this subchapter. Unless this rule provides otherwise, MCR 7.101 through 7.115 apply.

(B) Appeal of Right.

(1) *Time Requirements.* Time requirements are governed by MCR 7.104(A).

(2) *Manner of Filing.*

(a) Claim of Appeal — Form. The claim of appeal shall conform to the requirements of MCR 7.119(B)(2)(a).

(b) Claim of Appeal — Content. The claim of appeal must:

(i) state "[*Name of appellant*] claims an appeal from the decision on [*date*] by [*name of the agency*]," and

(ii) include concise statements of the following:

[A] the nature of the proceedings before the agency;

[B] citation to the statute, rule, or other authority enabling the agency to conduct the proceedings;

[C] citation to the statute or constitutional provision authorizing appellate review of the agency's decision or order in the circuit court; and

[D] the facts on which venue is based.

(c) Signature. The claim of appeal must be signed as stated in MCR 7.104(C)(3).

(d) Other Documents. The appellant must also comply with MCR 7.104(D).

(e) Filing Requirements in the Agency. The appellant must comply with MCR 7.104(E).

(f) Service. The appellant must comply with MCR 7.104(D)(7).

(3) *Appearance.* The appellee shall file an appearance that complies with MCR 7.104(F) within 14 days after service of the claim of appeal.

(C) Application for Leave to Appeal or for Interlocutory Appeal.

(1) *Time Requirements.* An application must comply with MCR 7.105(A).

(2) *Manner of Filing.* An application must comply with MCR 7.105 and MCR 7.112(B)(2)(b)(ii). An application for interlocutory appeal shall also state why review of the agency's final decision will not be an adequate remedy.

(3) *Answer.* An appellee may file an answer to an application that complies with MCR 7.105(C). The circuit court may require the filing of an answer.

(4) *If Application is Granted.* If the application is granted, the appeal proceeds as an appeal of right.

(D) Late Appeal. The appellant may file an application for late appeal if permitted by statute.

(1) *Time Requirements.* Unless inconsistent with the statute authorizing late appeal, the application must be filed within six months after entry of the agency decision or order.

(2) *Manner of Filing.* In addition to the requirements of MCR 7.105(B), the application must include:

(a) a statement citing the statute authorizing a late appeal;

(b) a statement of facts explaining the delay; and

(c) statements of jurisdiction and venue complying with MCR 7.120(B)(2)(b)(ii).

(3) *Answer*. An appellee may file an answer to the application for late appeal under MCR 7.105(C). The circuit court may require the filing of an answer.

(4) *If Application Is Granted.* If the application is granted, the appeal proceeds in the same manner as an appeal of right.

(E) Stay of Enforcement. The filing of an appeal or an application for leave to appeal does not stay enforcement of the agency's decision or order.

(1) A party may file a motion seeking a stay in the circuit court.

(2) For purposes of this subrule, the agency is entitled to notice even if it has not filed an appearance in the appeal.

(3) The court may order a stay on appropriate terms and conditions if it finds that:

(a) the moving party will suffer irreparable injury if a stay is not granted;

(b) the moving party made a strong showing that it is likely to prevail on the merits;

(c) the public interest will not be harmed if a stay is granted; and

(d) the harm to the moving party in the absence of a stay outweighs the harm to the other parties to the proceedings if a stay is granted.

(4) If the motion for stay is granted, the circuit court may set appropriate terms and conditions for the posting of a bond:

(a) in the amount required by any applicable statute authorizing the appeal, or

(b) in an amount and with sureties that the circuit court deems adequate to protect the public and the parties when there are no statutory instructions.

(5) *Temporary Stay.*

(a) The circuit court may grant a temporary stay of enforcement without written notice only if

(i) it clearly appears from facts alleged in the motion that immediate and irreparable injury will result if a stay is not entered before a hearing, and

(ii) the moving party certifies to the court in writing that it made reasonable efforts to contact the other parties and agency, but was unsuccessful.

(b) A temporary stay may be granted by the court until a hearing can be held. A hearing on a motion to dissolve a temporary stay will be heard on 24 hours' notice, or less on order of the court for good cause shown, and takes precedence over all matters except previously filed matters of the same character.

(F) Stipulations. The parties may stipulate regarding any issue on appeal or any part of the record on appeal if the stipulation is embodied in an order entered by the court.

(G) Decision. The court may affirm, reverse, remand, or modify the decision of the agency and may grant further relief as appropriate based on the record, findings, and conclusions.

(1) If the agency's decision or order is not supported by competent, material, and substantial evidence on the whole record, the court shall specifically identify the finding or findings that lack support.

(2) If the agency's decision or order violates the Constitution or a statute, is affected by a material error of law, or is affected by an unlawful procedure resulting in material prejudice to a party, the court shall specifically identify the agency's conclusions of law that are being reversed.

Staff Comment: These rules reflect a total rewrite of the rules relating to appeals to circuit court, and are modeled on the rules of the Court of Appeals.

The staff comment is not an authoritative construction by the Court.

Adopted December 8, 2011, effective January 1, 2012 (File No. 2008-36)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 7.205. APPLICATION FOR LEAVE TO APPEAL.

(A)-(D) [Unchanged.]

(E) Emergency Appeal.

(1)-(2) [Unchanged.]

(3) Where the trial court makes a decision on the admissibility of evidence and the prosecutor or the defendant files an interlocutory application for leave to appeal seeking to reverse that decision, the trial court shall stay proceedings pending resolution of the application in the Court of Appeals, unless the trial court

makes findings that the evidence is clearly cumulative or that an appeal is frivolous because legal precedent is clearly against the party's position. The appealing party must pursue the appeal as expeditiously as practicable, and the Court of Appeals shall consider the matter under the same priority as that granted to an interlocutory criminal appeal under MCR 7.213(C)(1). If the application for leave to appeal is filed by the prosecutor and the defendant is incarcerated, the defendant may request that the trial court reconsider whether pretrial release is appropriate.

(F)-(G) [Unchanged.]

Staff Comment: This amendment addresses the situation that arose in *People v Richmond*, 486 Mich 29 (2010), in which a prosecutor's dismissal of a case following a trial court's suppression of evidence in the case resulted in a finding that the appeal of the suppression order was moot. Under the amendment above, a party could pursue an interlocutory appeal of a trial court suppression order and in most cases would be entitled to a stay in the case.

The staff comment is not an authoritative construction by the Court.

Adopted December 21, 2011, effective May 1, 2012 (File Nos. 2005-05 and 2006-20)—REPORTER.

[Additions are indicated by underline, and deletions by strikethrough.]

RULE 2.403. CASE EVALUATION.

(A) Scope and Applicability of Rule.

(1) [Unchanged.]

(2) Case evaluation of tort cases filed in circuit court is mandatory beginning with actions filed after the effective dates of Chapters 49 and 49A of the Revised Judicature Act, as added by 1986 PA 178.~~; however, the court may except an action from case evaluation on~~

~~motion for good cause shown if it finds that case evaluation of that action would be inappropriate.~~

(3) A court may exempt claims seeking equitable relief from case evaluation for good cause shown on motion or by stipulation of the parties if the court finds that case evaluation of such claims would be inappropriate.

~~(3)~~(4) [Renumbered but unchanged.]

(B) Selection of Cases.

(1) The judge to whom an action is assigned or the chief judge may select it for case evaluation by written order ~~no earlier than 91 days~~ after the filing of the answer

(a) on written stipulation by the parties,

(b) on written motion by a party, or

(c) on the judge's own initiative.

(2) Selection of an action for case evaluation has no effect on the normal progress of the action toward trial.

(C)-(G) [Unchanged.]

(H) Fees.

(1) ~~Within 14 days after the mailing of the notice of the case evaluation hearing, unless otherwise ordered by the court, e~~ Each party must send ~~to the ADR clerk~~ a check for $75 made payable in the manner and within the time specified in the notice of the case evaluation hearing. However, if a judge is a member of the panel, the fee is $50. If the order for case evaluation directs that payment be made to the ADR clerk, ~~T~~ the ADR clerk shall arrange payment to the case evaluators. Except by stipulation and court order, the parties may not make any other payment of fees or expenses to the case evaluators than that provided in this subrule.

(2) Only a single fee is required of each party, even where there are counterclaims, cross-claims, or third-party claims. A person entitled to a fee waiver under MCR 2.002 is entitled to a waiver of fees under this rule.

(3) If one claim is derivative of another (e.g., husband-wife, parent-child) they must be treated as a single claim, with one fee to be paid and a single award made by the case evaluators.

~~(4) In the case of multiple injuries to members of a single family, the plaintiffs may elect to treat the action as involving one claim, with the payment of one fee and the rendering of one lump sum award to be accepted or rejected. If no such election is made, a separate fee must be paid for each plaintiff, and the case evaluation panel will then make separate awards for each claim, which may be individually accepted or rejected.~~

(4)~~(5)~~ Fees paid pursuant to subrule (H) shall be refunded to the parties if

(a) the court sets aside the order submitting the case to case evaluation or on its own initiative adjourns the case evaluation hearing, or

(b) the parties notify the ADR clerk in writing at least 14 days before the case evaluation hearing of the settlement, dismissal, or entry of judgment disposing of the action, or of an order of adjournment on stipulation or the motion of a party.

~~In the case of an adjournment, the fees shall not be refunded if the adjournment order sets a new date for case evaluation.~~ If case evaluation is rescheduled at a later time, the fee provisions of subrule (H) apply regardless of whether previously paid fees have been refunded. ~~Penalties for late filing of papers under subrule (I)(2) are not to be refunded.~~

(5) Fees paid pursuant to subrule (H) shall not be refunded to the parties if

(a) in the case of an adjournment, the adjournment order sets a new date for case evaluation and the fees are applied to the new date, or

(b) the request for and granting of adjournment is made within 14 days of the scheduled case evaluation, unless waived for good cause.

Penalties for late filing of papers under subrule (I)(2) are not to be refunded.

(I) Submission of Summary and Supporting Documents.

(1) Unless otherwise provided in the notice of hearing, ~~A~~at least 14 days before the hearing, each party shall ~~file with the ADR clerk 3 copies of documents pertaining to the issues to be mediated and 3 copies of a concise summary setting forth that party's factual and legal position on issues presented by the action, and shall serve one copy of the documents and summary on each attorney of record. A copy of a proof of service must be attached to the copies filed with the ADR clerk.~~

(a) serve a copy of the case evaluation summary and supporting documents in accordance with MCR 2.107, and

(b) file a proof of service and three copies of a case evaluation summary and supporting documents with the ADR clerk.

(2) Each ~~F~~failure to timely file and serve the ~~required~~ materials identified in subrule (1), ~~with the ADR clerk or to serve copies on each attorney of record by the required date~~ and each subsequent filing of supplemental materials within 14 days of the hearing, subjects the offending attorney or party to a $150 penalty to be paid in the manner specified in the notice of the case

evaluation hearing. An offending attorney shall not charge the penalty to the client, unless the client agreed in writing to be responsible for the penalty.

(3) The case evaluation summary shall consist of a concise summary setting forth that party's factual and legal position on issues presented by the action. Except as permitted by the court, the summary shall not exceed 20 pages double spaced, exclusive of attachments. Quotations and footnotes may be single spaced. At least one-inch margins must be used, and printing shall not be smaller than 12-point font.

(J) Conduct of Hearing.

(1)-(2) [Unchanged.]

(3) Oral Presentation shall be limited to 15 minutes per side unless multiple parties or unusual circumstances warrant additional time. Information on ~~applicable insurance policy limits and~~ settlement negotiations not protected under MCR 2.412 and applicable insurance policy limits shall be disclosed at the request of the case evaluation panel.

(4)-(5) [Unchanged.]

(K) Decision.

(1) [Unchanged.]

(2) Except as provided in subrule (H)(3), ~~T~~the evaluation must include a separate award as to ~~the~~ each plaintiff's claim against each defendant and as to each cross-claim, counterclaim, or third-party claim that has been filed in the action. For the purpose of this subrule, all such claims filed by any one party against any other party shall be treated as a single claim.

(3)-(5) [Unchanged.]

(L) [Unchanged.]

(M) Effect of Acceptance of Evaluation.

(1) If all the parties accept the panel's evaluation, judgment will be entered in accordance with the evaluation, unless the amount of the award is paid within 28 days after notification of the acceptances, in which case the court shall dismiss the action with prejudice. The judgment or dismissal shall be deemed to dispose of all claims in the action and includes all fees, costs, and interest to the date it is entered, except for cases involving rights to personal protection insurance benefits under MCL 500.3101 *et seq.*, for which judgment or dismissal shall not be deemed to dispose of claims that have not accrued as of the date of the case evaluation hearing.

(2) If only a part of an action has been submitted to case evaluation pursuant to subrule (A)(3) and all of the parties accept the panel's evaluation, the court shall enter an order disposing of only those claims.

~~(2)~~(3) [Renumbered but unchanged.]

(N) [Unchanged.]

(O) Rejecting Party's Liability for Costs.

(1)-(4) [Unchanged.]

(5) If the verdict awards equitable relief, costs may be awarded if the court determines that

(a) taking into account both monetary relief (adjusted as provided in subrule [O][3]) and equitable relief, the verdict is not more favorable to the rejecting party than the evaluation or, in situations where both parties have rejected the evaluation, the verdict in favor of the party seeking costs is more favorable than the case evaluation, and

(b) it is fair to award costs under all of the circumstances.

(6) [Unchanged.]

(7) Costs shall not be awarded if the case evaluation award was not unanimous. If case evaluation results in a nonunanimous award, a case may be ordered to a subsequent case evaluation hearing conducted without reference to the prior case evaluation award, or other alternative dispute resolution process, at the expense of the parties, pursuant to MCR 2.410(C)(1).

(8) [Unchanged.]

(9) In an action under MCL 436.1801 ~~436.22~~, if the plaintiff rejects the award against the minor or alleged intoxicated person, or is deemed to have rejected such an award under subrule (L)(3)(c), the court shall not award costs against the plaintiff in favor of the minor or alleged intoxicated person unless it finds that the rejection was not motivated by the need to comply with MCL 436.1801(6) ~~436.22(6)~~.

(10)-(11) [Unchanged.]

RULE 2.404. SELECTION OF CASE EVALUATION PANELS.

(A) [Unchanged.]

(B) Lists of Case Evaluators.

(1)-(4) [Unchanged.]

(5) *Reapplication*. Persons shall be placed on the list of case evaluators for a fixed period of time, not to exceed seven ~~5~~ years, and must reapply at the end of that time in the ~~same~~ manner directed by the court ~~as persons seeking to be added to the list~~.

(6)-(8) [Unchanged.]

(C) [Unchanged.]

(D) Supervision of Selection Process.

(1) The chief judge shall exercise general supervision over the implementation of this rule and shall review the operation of the court's case evaluation plan at least

annually to assure compliance with this rule. In the event of noncompliance, the court shall take such action as is needed. This action may include recruiting persons to serve as case evaluators or changing the court's case evaluation plan. ~~The court shall submit an annual report to the State Court Administrator on the operation of the court's case evaluation program on a form provided by the State Court Administrator.~~

(2) [Unchanged.]

RULE 2.410. ALTERNATIVE DISPUTE RESOLUTION.

(A) [Unchanged.]

(B) ADR Plan.

(1)-(2) [Unchanged.]

(3) The plan may also provide for referral relationships with local dispute resolution centers, including those affiliated with the Community Dispute Resolution Program. In establishing a referral relationship with centers or programs, courts, at a minimum, shall take into consideration factors that include whether parties are represented by counsel, the number and complexity of issues in dispute, the jurisdictional amount of the cases to be referred, and the ability of the parties to pay for dispute resolution services. The plan must preserve the right of parties to stipulate to the selection of their own mediator under MCR 2.411(B)(1).

(4) [Unchanged.]

(C)-(F) [Unchanged.]

RULE 2.411. MEDIATION.

(A) [Unchanged.]

(B) Selection of Mediator.

(1)-(3) [Unchanged.]

(4) The court shall not appoint, recommend, direct, or otherwise influence a party's or attorney's selection of a mediator except as provided pursuant to this rule. The court may recommend or advise parties on the selection of a mediator only upon request of all parties by stipulation in writing or orally on the record.

~~(4)~~(5) [Renumbered but unchanged.]

(C) [Unchanged.]

(D) Fees.

(1) A mediator is entitled to reasonable compensation ~~based on an hourly rate~~ commensurate with the mediator's experience and usual charges for services performed.

(2)-(5) [Unchanged.]

(E) List of Mediators

(1) Application. ~~An eligible person desiring~~ ~~to~~To appear on a roster ~~serve as a mediator~~, an applicant, which may be an individual or organization, may apply to the ADR clerk to be placed on the court's list of mediators. Application forms shall be available in the office of the ADR clerk.

(a) The form shall include a certification that

(i) the applicant meets the requirements for service under the court's selection plan;

(ii) the applicant will not discriminate against parties or attorneys on the basis of race, ethnic origin, gender, or other protected personal characteristic; and

(iii) the applicant ~~mediator~~ will comply with the court's ADR plan, orders of the court regarding cases submitted to mediation, and the standards of conduct adopted by the State Court Administrator under subrule (G).

(b) ~~On the form t~~The applicant shall indicate on the form the applicant's ~~hourly~~ rate for providing mediation services.

(c) The form shall include an optional section identifying the applicant's gender and racial/ethnic background.

(d) An applicant Community Dispute Resolution Program center must select only mediators who meet the qualifications of this rule or training requirements established by the State Court Administrator to mediate cases ordered by the court.

(2) Review of Applications. The court's ADR plan shall provide for a person or committee to review applications annually, or more frequently if appropriate, and compile a list of qualified mediators.

(a) ~~Persons~~ Applicants meeting the qualifications specified in this rule shall be placed on the list of approved mediators. Approved mediators shall be placed on the list for a fixed period, not to exceed ~~5~~ seven years, and must reapply at the end of that time in the ~~same~~ manner ~~as persons seeking to be added to the list~~ directed by the court.

(b) Selections shall be made without regard to race, ethnic origin, or gender. Residency or principal place of business may not be a qualification.

(c) The approved list and the applications of approved mediators, except for the optional section identifying the applicant's gender and racial/ethnic background, shall be available to the public in the office of the ADR clerk.

(d) An applicant may attach a résumé or biographical information to the application.

(3)-(4) [Unchanged.]

(F) Qualifications of Mediators.

(1) [Unchanged.]

(2) General Civil Mediation. To be eligible to serve as a general civil mediator, a person must meet the following minimum qualifications:

(a)-(b) [Unchanged.]

(c) Upon completion of the training required under subrule (F)(2)(a), ~~O~~observe two general civil mediation proceedings conducted by an approved mediator, and conduct one general civil mediation to conclusion under the supervision and observation of an approved mediator.

(3)-(5) [Unchanged.]

(G) [Unchanged.]

RULE 2.412. MEDIATION COMMUNICATIONS; CONFIDENTIALITY AND DISCLOSURE.

(A)-(C) [Unchanged.]

(D) Exceptions to Confidentiality. Mediation communications may be disclosed under the following circumstances:

(1)-(9) [Unchanged.]

(10) The disclosure is included in a report of professional misconduct filed against a mediation participant or is ~~used~~sought or offered to prove or disprove misconduct allegations in the attorney disciplinary process.

(11) The mediation communication occurs in a case out of which a claim of ~~legal~~ malpractice arises and the disclosure is sought or offered to prove or disprove a claim of ~~legal~~ malpractice against a mediation participant.

(12) [Unchanged.]

(E) [Unchanged.]

RULE 3.216. DOMESTIC RELATIONS MEDIATION.

(A)-(D) [Unchanged.]

(E) Selection of Mediator.

(1)-(2) [Unchanged.]

(3) If the parties have not stipulated to a mediator:~~,~~

(a) the parties must indicate whether they prefer a mediator who is willing to conduct evaluative mediation. Failure to indicate a preference will be treated as not requesting evaluative mediation.

(b)~~(4) If the parties have not stipulated to a mediator, the judge may recommend, but not appoint one. If the judge does not make a recommendation, or if the recommendation is not accepted by the parties,~~ the ADR clerk will assign a mediator from the list of qualified mediators maintained under subrule (F). The assignment shall be made on a rotational basis, except that if the parties have requested evaluative mediation, only a mediator who is willing to provide an evaluation may be assigned.

(4) The court shall not appoint, recommend, direct, or otherwise influence a party's or attorney's selection of a mediator except as provided pursuant to this rule. The court may recommend or advise parties on the selection of a mediator only upon request of all parties by stipulation in writing or orally on the record.

(5) [Unchanged.]

(F) List of Mediators.

(1) Application. To appear on a roster, an applicant, which may be an individual or organization, ~~An eligible person desiring to serve as a domestic relations mediator~~ may apply to the ADR clerk to be placed on the court's list of mediators. Application forms shall be available in the office of the ADR clerk.

(a) The form shall include a certification that

(i) the applicant meets the requirements for service under the court's selection plan;

(ii) the applicant will not discriminate against parties or attorneys on the basis of race, ethnic origin, gender, or other protected personal characteristic; and

(iii) the applicant ~~mediator~~ will comply with the court's ADR plan, orders of the court regarding cases submitted to mediation, and the standards of conduct adopted by the State Court Administrator under subrule (K).

(b) The applicant shall indicate on the form whether the applicant is willing to offer evaluative mediation, and the applicant's ~~hourly~~ rate for providing mediation services.

(c) [Unchanged.]

(2) Review of Applications. The court's ADR plan shall provide for a person or committee to review applications annually, or more frequently if appropriate, and compile a list of qualified mediators.

(a) ~~Persons~~ Applicants meeting the qualifications specified in this rule shall be placed on the list of approved mediators. Approved mediators shall be placed on the list for a fixed period of time, not to exceed ~~5~~ seven years, and must reapply at the end of that time in the ~~same~~ manner ~~as persons seeking to be added to the list~~ directed by the court.

(b) Selections shall be made without regard to race, ethnic origin, or gender. Residency or principal place of business may not be a qualification.

(c) The approved list and the applications of approved mediators, except for the optional section identifying the applicant's gender and racial/ethnic background, shall be available to the public in the office of the ADR clerk.

(d) An applicant may attach a résumé or biographical information to the application.

(e) An applicant Community Dispute Resolution Program center must select only mediators who meet the qualifications of this rule or training requirements established by the State Court Administrator to mediate cases ordered by the court.

(3)-(4) [Unchanged.]

(G) Qualifications of Mediators.

(1) To be eligible to serve as a domestic relations mediator under this rule, an applicant must meet the following minimum qualifications:

(a) The applicant must

(i) be a licensed attorney, a licensed or limited licensed psychologist, a licensed professional counselor, or a licensed marriage and family therapist;

(ii) have a master's degree in counseling, social work, or marriage and family therapy;

(iii) have a graduate degree in a behavioral science; or

(iv) have five years experience in family counseling.

(b) The applicant must have completed a training program approved by the State Court Administrator providing the generally accepted components of domestic relations mediation skills.

(c) Upon completion of the training required under subrule (G)(1)(b), ~~The applicant must have~~ the applicant must observe~~d~~ two domestic relations mediation proceedings conducted by an approved mediator, and ~~have~~ conduct~~ed~~ one domestic relations mediation to conclusion under the supervision and observation of an approved mediator.

(2)-(4) [Unchanged.]

(H)-(K) [Unchanged.]

Staff Comment: The amendments of MCR 2.403, 2.404, 2.410, 2.411, and 2.412 revise court rules relating to mediation and case evaluation largely as recommended by the Dispute Resolution Rules Committee convened by the State Court Administrative Office. The amendment of MCR 3.216 reflects amendments to provisions that appear in MCR 2.411 that also appear in MCR 3.216.

The staff comment is not an authoritative construction by the Court.

Adopted February 1, 2012, effective May 1, 2012 (File No. 2004-55)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 3.211. JUDGMENTS AND ORDERS.

(A)-(C) [Unchanged.]

(D) Uniform Support Orders

(1) Any provisions regarding child support or spousal support must be prepared on the latest version of the Uniform Support Order ~~drafted~~approved by the state court administrative office ~~and approved by the Supreme Court~~. This order must accompany any judgment or order affecting child support or spousal support, and both documents must be signed by the judge. If only child support or spousal support is ordered, then only the Uniform Support Order must be submitted to the court for entry. The Uniform Support Order shall govern if the terms of the judgment or order conflict with the Uniform Support Order.

(2)-(3) [Unchanged.]

(E)-(H) [Unchanged.]

Staff Comment: This amendment eliminates the requirement that the Supreme Court approve changes to the Uniform Support Order forms. Without explicit approval required by the Supreme Court, the forms will be updated like other forms that are revised on a regular basis within the State Court Administrative Office.

The staff comment is not an authoritative construction by the Court.

Adopted February 1, 2012, effective April 1, 2012 (File No. 2012-05)—REPORTER.

On order of the Court, this is to advise that the Court is adopting Rule 3.616 of the Michigan Court Rules, effective April 1, 2012, but to ensure the rule's compliance with federal Title IV-E funding requirements, Rule 3.616 has been adopted pending public comment. Before determining whether the proposal should be changed, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

[The text of the rule is new.]

RULE 3.616. PROCEEDING TO DETERMINE CONTINUATION OF VOLUNTARY FOSTER CARE SERVICES.

(A) Scope of Rule. This rule governs review of all voluntary foster care agreements made pursuant to article II of the Young Adult Voluntary Foster Care Act, MCL 400.645 through MCL 400.663.

(B) Jurisdiction. Upon the filing of a petition under this rule, the family division of the circuit court has jurisdiction to review an agreement for the voluntary extension of foster care services after age 18.

(C) Court File. Upon the filing of a petition under subrule (E), the court shall open a file using the appropriate case classification code from MCR 8.117(A)(9). The file shall be closed following the issuance of the court's determination under subrule (F).

(D) Form. The petition and the judicial determination shall be prepared on forms approved by the state court administrator.

(E) Ex Parte Petition; Filing, Contents, Service. Within 150 days after the signing of a voluntary foster care agreement, the Department of Human Services shall file with the family division of the circuit court, in the county where the youth resides, an ex parte petition requesting the court's determination that continuing in voluntary foster care is in the youth's best interests.

(1) Contents of Petition. The petition shall contain

(a) the youth's name, date of birth, gender, and current address;

(b) the name, date of birth, and residence address of the youth's parents or legal custodian (if parental rights have not been terminated);

(c) the name and address of the youth's foster parent or parents;

(d) a statement that the youth has been notified of the right to request a hearing regarding continuing in foster care;

(e) a showing that jurisdiction of a court over the youth's child protective proceeding has been terminated, including the name of the court and the date jurisdiction was terminated;

(f) a statement of facts that supports the voluntary foster care agreement and includes both

(i) the reasonable efforts made to achieve permanency for the youth, and

(ii) the reasons why it remains in the youth's best interests to continue in voluntary foster care; and

(g) any other information the Department of Human Services, parent or legal custodian, youth, or foster parent wants the court to consider.

(2) Supporting Documents. The petition shall be accompanied by a written report prepared pursuant to MCL 400.655 and a copy of the signed voluntary foster care agreement.

(3) Service. The Department of Human Services shall serve the petition on

(i) the youth;

(ii) the court that had jurisdiction pursuant to MCL 712A.2(b) during the neglect/abuse proceeding, if different than the court in which the petition is filed; and

(iii) the foster parent or parents, if any.

(F) Judicial Determination. The court shall review the petition, report, and voluntary foster care agreement filed pursuant to subrule (E), and then make a determination whether continuing in voluntary foster care is in the best interests of the youth.

(1) Written Order; Time. The court shall issue an order that includes its determination and individualized findings that support its determination. The findings shall be based on the Department of Human Services' written report and other information filed with the court. The order must be signed and dated within 21 days of the filing of the petition.

(2) Service. The court shall serve the order on

(i) the Department of Human Services;

(ii) the youth;

(iii) the court that had jurisdiction pursuant to MCL 712A.2(b), if different than the court in which the petition is filed; and

(iv) the foster parent or parents, if any.

Staff Comment: New MCR 3.616 implements the judicial action requirements of 2011 PA 225, the Young Adult Voluntary Foster Care Act, MCL 400.641 *et seq*.

This Court adopted the new rule to become effective April 1, 2012, to coincide with implementation of the Department of Human Services' new program to provide continuing voluntary foster care for youth between the ages of 18 and 21, which will begin operating on April 1, 2012. Having this new court rule in place will enable Michigan to receive federal Title IV-E funding for that program.

By this same order, the Court is inviting public comment to allow interested persons an opportunity to comment and to provide an opportunity to be heard at a future public hearing. This will allow the Court to consider amending the rule in response to any comments that it receives.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2012-05. Your comments and the comments of others will be posted at www.courts/mi.gov/supremecourt/resources/administrative/index.htm.

Adopted February 1 2012, effective May 1, 2012 (File No. 2010-15)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 6.005. RIGHT TO ASSISTANCE OF LAWYER; ADVICE; APPOINTMENT FOR INDIGENTS; WAIVER; JOINT REPRESENTATION; GRAND JURY PROCEEDINGS.

(A)-(G) [Unchanged.]

(H) Scope of Trial Lawyer's Responsibilities. The responsibilities of the trial lawyer who represents the defendant include:

(1)-(3) [Unchanged.]

(4) Unless an appellate lawyer has been appointed or retained, or if retained trial counsel withdraws, the trial lawyer who represents the defendant is responsible for filing postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing, and.

(5) when an appellate lawyer has been appointed or retained, promptly making the defendant's file, including all discovery material obtained, available for copy-

ing upon request of that lawyer. The trial lawyer must retain the materials in the defendant's file for at least five years after the case is disposed in the trial court.

(I) [Unchanged.]

Staff Comment: This amendment clarifies that trial counsel is required to make a defendant's file available to an appellate lawyer, and is required to retain the file for at least five years after disposition of the case in the trial court. This file was prompted by reports of appellate counsel having difficulty obtaining trial materials (especially video or audio materials that were not transcribed as part of the transcript). The five-year period mirrors the five-year retention period contained in MRPC 1.15(b)(2).

The staff comment is not an authoritative construction by the Court.

AMENDMENTS OF MICHIGAN RULES OF EVIDENCE

Adopted December 22, 2011, effective January 1, 2012 (File No. 2010-12)—REPORTER.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 606. COMPETENCY OF JUROR AS WITNESS.

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may

not be received on a matter about which the juror would be precluded from testifying.

Staff Comment: The amendment of MRE 606 makes Michigan's rule more consistent with FRE 606, and clarifies the types of information a juror may testify to if an inquiry is made into a verdict or indictment.

The staff comment is not an authoritative construction by the Court.

AMENDMENTS OF LOCAL COURT RULES

THIRTY-SEVENTH JUDICIAL CIRCUIT (CALHOUN COUNTY)

Approved September 28, 2011, effective immediately (File No. 2011-20)—REPORTER.

On order of the Court, Rule 2.119 and Rule 2.403 of the Local Court Rules of the 37th Circuit Court in Calhoun County are rescinded, effective immediately.

AMENDMENTS OF MICHIGAN RULES OF PROFESSIONAL CONDUCT

Entered October 6, 2011 (File No. 2010-07)—REPORTER.

On order of the Court, the proposed amendment of Rule 1.5 of the Michigan Rules of Professional Conduct having been published for comment at 489 Mich 1241 (2011), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

Entered October 6, 2011 (File No. 2011-05)—REPORTER.

On order of the Court, the proposed amendments of Rules 1.1, 1.2, 1.3, 1.4, 1.5, 1.6, 1.7, 1.9, 1.13, 1.14, 1.15, 1.16, 1.17, 3.2, 4.1, 4.3, 5.2, and 8.4 of the Michigan Rules of Professional Conduct having been published for comment at 489 Mich 1202 (2011), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendments. This administrative file is closed without further action.

Entered October 6, 2011 (File No. 2010-18)—REPORTER.

On order of the Court, the proposed amendment of Rule 6.1 of the Michigan Rules of Professional Conduct having been published for comment at 487 Mich 1203

(2010), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

Entered December 8, 2011 (File No. 2002-24)—REPORTER.

On order of the Court, the proposed amendment of Rule 7.3 of the Michigan Rules of Professional Conduct having been published for comment at 489 Mich 1285 (2011), and an opportunity having been provided for comment in writing and at a public hearing, the Court declines to adopt the proposed amendment. This administrative file is closed without further action.

PRESENTATION OF THE PORTRAIT OF THE HONORABLE CLIFFORD W. TAYLOR

SEPTEMBER 14, 2011

CHIEF JUSTICE ROBERT P. YOUNG, JR.: Well, welcome. It's my privilege on behalf of my colleagues to welcome each and every one of you here this afternoon to receive the portrait of our former colleague, my good friend, Chief Justice CLIFFORD W. TAYLOR, who for many years sat in this very courtroom and for the end of his term presided here. For those of you who have never been to a portrait unveiling, it is the moral equivalent of a wake without a body. And we are all happy to have Cliff with us again. We are happy to see the presentment of the artist's arts rather than the embalmers'.

I have been placed on a great deal of restraint. You can't possibly know having been on the receiving end of his barbed and rapier wit how much restraint it takes for me with an audience present and him in the well of the Court not to return fire. But we are pleased to have you back here, and we will all enjoy seeing just how well Patricia Burnett worked up your portrait to disguise the depredations of age.

Now this proceeding is not only being memorialized in a future volume of the *Michigan Reports*, it's being recorded on MGTV, Michigan Government TV, so again, I'm admonishing all of you—I obviously haven't been

quite as punctilious about this—but we let you know that this is a public occasion. The roast will be later.

The first of our speakers today is none other than our own Wallace D. Riley, who is the president of the Michigan Supreme Court Historical Society, to tell you about that wonderful organization.

MR. WALLACE D. RILEY: Thank you, Mr. Chief Justice. Mr. Chief Justice, associate justices, Justice TAYLOR, distinguished judges in the audience, Taylor family and friends. On behalf of the board of directors of the Michigan Supreme Court Historical Society and all of its members, I want to thank the Court for the opportunity to appear and participate in today's special session, which will, in fact, be a part of the *Michigan Reports*.

Many of you here today are familiar with the work of the society because you are its members. But for those of you in the audience who are not familiar, allow me to say that the society was organized in 1988 to preserve documents, records, and memorabilia of the Michigan Supreme Court and to promote education and awareness of the historical significance of our Court. One of the most important ongoing functions is the maintenance of the Court's historical portrait collection. The society is the caretaker for 87 portraits, all relating to the Court. This number includes individual portraits of the majority of the justices who have sat on this Court.

The history of how this collection came to be bears some retelling. The society began its activities 23 years ago by making a search for and bringing together all of the historic paintings. Many of the portraits of early justices were, in fact, almost nonexistent. For all purposes, they had been shoved into closets, packed away in dusty storage areas. Some of them were quite badly damaged and nearly unrecognizable. The portrait of

NATHANIEL BACON, for example, has been shredded in several dozen places. And one thought was that the society should find these portraits and professionally restore them, and categorize them and catalog them with the Congress of the United States, the Library of Congress. You can view some of the portraits by simply going out in the hallways in this building; they're hanging here. You can view all of them and the details about the images and the people in the portraits by going to our website: www.micourthistory.org. Even today, we continue to work with art conservationists to protect and care for these historical treasures. Each year, we inventory the collection to inspect the portraits for damage, and we use the funds raised from our members by dues to restore the portraits to their original luster.

However, our being here today brings to mind another important function of the society, and that is to make presentations of newly painted portraits to the Court. Since 1988, the society has been privileged to participate and to bring to the Court 17 such portraits in special sessions of the Court. Today the likeness of Justice TAYLOR, the 100th justice to serve on the Court, will join the likenesses of G. MENNEN WILLIAMS, ROBERT GRIFFIN, JAMES BRICKLEY, MARY COLEMAN, BLAIR MOODY, JR., JOHN FITZGERALD, CHARLES LEVIN, PATRICIA BOYLE, JAMES RYAN, THOMAS GILES KAVANAGH, and so many, many more. They illustrate in a profound way the history of the Michigan Supreme Court.

Finally, and may it please the Court, I choose to offer an observation more personal. You may have noticed that in the list of names of justices, the name of DOROTHY COMSTOCK RILEY was omitted. Her portrait hangs just outside this courtroom. It was presented in 1997, shortly after she was diagnosed with Parkinson's

and chose to resign from the Court. Governor [John] Engler appointed Judge CLIFFORD TAYLOR to her remaining two-year term. For the record, you should know that she took great comfort in his selection of her successor. Nine years earlier in 1988, when she was serving as chief justice, she founded the Michigan Supreme Court Historical Society to record and preserve Court history. Today we close another memorable chapter in that history with the presentation of the portrait of the Honorable CLIFFORD W. TAYLOR.

CHIEF JUSTICE YOUNG: Thank you. Now we begin the more serious part of the personal business of recognizing and recalling the chief justice, and the first in that pantheon of speakers is our U.S. Secretary of Energy and former Senator, the Honorable Spencer Abraham.

MR. SPENCER ABRAHAM: May it please the Court. Justices, Mr. Chief Justice, friends.

CHIEF JUSTICE YOUNG: You've been in Court before.

MR. ABRAHAM: Actually, no. Uh, no. [Laughter.]

CHIEF JUSTICE YOUNG: You're doing well.

MR. ABRAHAM: I always thought I would be dragged here, but not for something as positive as this. But in any event, it's good to be here today.

For me this is a somewhat ironic situation in that this event is taking place on September 14th, and that just happens to be the birthday of my mother, who many of you knew—she was a friend of a lot of people in this room, and of course was a great political activist here in Michigan. And it was actually my mother who first met Cliff TAYLOR. And I remember as a college student who loved politics her coming home one day saying, "I just met this new young lawyer who's gotten active in the

local Republican Party, and I think the two of you would really get along, you gotta meet him," and she was right.

For 40 years our friendship has endured. It has endured many interesting and challenging experiences together. Political victories and defeats, perhaps a few too many of the latter. Cliff endured—in 1974, when he had me manage his first race for public office—a great political public relations idea I had in which he spent an entire day being a working man, working upon a garbage truck in Ingham County, Michigan, on the goal of getting great publicity as a guy who's a man of the people—except the press never showed up.

CHIEF JUSTICE YOUNG: I'll bet the garbage did.

MR. ABRAHAM: That was one of my greater achievements in politics, but he endured it.

And I've endured about 40 years of the sorts of comments and taunts that the Chief Justice referenced a few moments ago—most in good nature, but the disturbingly accurate observations about me that Cliff was so apt to bring up, probably the most poignant of which, and correct I might add, was when he pointed out that the only elections he ever won were the ones that took place when I was safely ensconced in Washington. But through the wins and losses, through births and deaths, through geographic separation, our friendship has endured, and I consider it one of the really great gifts which my mother bestowed upon me.

Today I'd like to talk about Cliff's career and his life on several levels—as a public man, as a private one, and as a friend. First, there is Justice CLIFFORD TAYLOR, who headed our Court and served with great distinction in this judicial system. I know that much will be said about what Cliff accomplished here and in his judicial career by future speakers today, so I will leave it to his

colleagues to comment on those achievements. Instead, what I'd like to do is to just briefly discuss what I consider the broader impact that Justice TAYLOR has had on the law and on the jurisprudence of our times.

When we began our friendship way back in 1971, we weren't just interested in becoming involved politically—I mean that was maybe the fun part of it, but it wasn't the motive that got us interested and engaged. And more particularly, what we were motivated by was a desire to have an impact on the legal discourse in our country. It was a topic we talked a lot about. He had just arrived in this community as a prosecutor working for Prosecutor [Raymond L.] Scodeller, I think at the time, and I was about to head off to law school myself. Now, it's hard to imagine two guys sitting in a restaurant in Lansing, Michigan, having this absurd notion that they could in some way have an impact on such a really large and important set of issues as the jurisprudence of their country. And yet, amazingly, in several ways we did.

When I went to law school at Harvard in 1975, I was fortunate enough to identify a group of other similar, similar students in terms of political philosophy and legal philosophy. And collectively we thought it might be a good idea to launch a publication in which we would present more traditional and conservative opinions of the law as a new type of law review. We launched that publication in 1977, and it remains today one of the most widely read publications in the legal community: the *Harvard Journal of Law and Public Policy*. And it's actually thanks to Cliff's efforts, who helped us to raise the initial seed capital to get the publication launched, and who actually served as our first advisor to that publication, that we were able to get it started. And today, as I say, it has a subscriber list of over 10,000 nationwide, even larger now—one of the largest distrib-

uted law reviews in America—and we thank you, Cliff, for having made that contribution. And that contribution actually then led shortly thereafter to the involvement of students at other law schools who found the journal an interesting forum and felt that they had an opportunity perhaps in their schools to do similar things, which ultimately in 1982 grew into the Federalist Society. And so from a sort of kernel of an idea here in Lansing in 1971, there emerged, really, a great legacy in terms of what was achieved. Since then and in a variety of contexts, Cliff's countless appearances at seminars, at fora and conferences all over the country for three decades, debating and discussing not just the legal issues of the day but the broader direction of the law in our society and the proper role of the judiciary under our separation-of-powers system I think has had a really profound influence in many quarters. And it is that impact that I think really is what we should recognize here today.

As I said, I'll leave it to Cliff's colleagues to discuss his specific achievements here in this courtroom and in our judicial system, but I think I can speak with some authority to the fact that his broader contributions have been extremely significant and that he is viewed upon a national level as having been one of the most relevant contributors of conservative intellectual leadership on issues relating to the law in our time. And, Cliff, for that I think you're owed a much broader debt from many of us.

Then there's also the second person, Cliff TAYLOR the private man, the one that a smaller number of us know. This is the man with the incredible sense of humor—mostly directed at people like the current chief justice and a few other, select, fortunate individuals. This is

also the loving husband who is married to one of the most outstanding people I know, Lucille Taylor.

CHIEF JUSTICE YOUNG: The smarter of the two.

MR. ABRAHAM: Correction. In fact, as we commend Cliff for his contributions to our state today, I think it's really important that we acknowledge that there are very few people who have done more for Michigan as a public servant in their own right than Lucille Taylor. I remember when I was first getting to know Cliff and Lucille in the early 1970s, and constantly thinking to myself, How did he get her to marry him? And even 40 years later, Lucille, I am still thinking that very same thing. There's also the devoted father of Michael and John, whom he loves so dearly and who in your absence, guys, he discusses in the most intimate and positive ways and to whom he is totally devoted. He's also a man of unflinching loyalty to his friends and the things he believes in. And he is an incorruptible man, whose integrity is and has always been unchallengeable in my opinion.

And finally, there is Cliff TAYLOR my friend. This is the man who became a mentor and a friend to me, as I was reaching maturity, and who helped guide me on a path that ultimately led to my own opportunities to serve in public service. So, Cliff, my friend, I thank you for all of that—and to you and Lucille for the many great things you've done for me and my family over the years.

Soon we will see Cliff's portrait. He is fortunate that the artist—the wonderful Patricia Hill Burnett, who's here today—has known him for many years. Because of that, I know that she has captured far more than the image of Justice TAYLOR. She has captured his texture—the various many layers that I just talked about. As some of you know, as a former cabinet member I too actually had my portrait

done, as is the custom in Washington—this was a couple of years ago. Unfortunately, in my case I had not previously met the artist before we began, so unlike this case, he didn't know me personally. This approach actually has its advantages because I was able to convince him that rather than capturing me as he was meeting me, he should, in fact, portray me in the way I looked the day I took office. That was six years before, and he had no idea what that looked like. It allowed me to describe myself to him. So I described my earlier self—thinner, squarer jawed, no gray hair, etc.—and he did a fantastic job. In fact, half the room thought he had brought the wrong portrait to unveil. But what I gained in terms of cosmetic enhancement, I lost in terms perhaps a little bit of substance.

But that will not be the case here today, because today we will see the portrait of Cliff TAYLOR, a portrait that will capture the substance of a great man—a strong yet passionate man, intelligent yet understanding, and faithful always to his God, his state, and his country. Cliff, congratulations.

CHIEF JUSTICE YOUNG: And now I am pleased to call to the podium my former colleague, the current director of the Department of Human Services, who is fondly known as the Director Whirling Dervish, the Honorable MAURA D. CORRIGAN. And you are admonished to observe the length of time humans can go without relief.

THE HONORABLE MAURA D. CORRIGAN: May it please the Court. Mr. Chief Justice, justices of the Supreme Court, Chief Justice TAYLOR, and family and friends of Cliff TAYLOR, a moment of personal privilege to say how wonderful all you justices look. I've never sat on that side before, and I miss you.

Thank you for the chance to share my admiration and love for my friend, Cliff TAYLOR, on this very special day in the history of the Michigan Supreme Court. Cliff,

it doesn't seem possible that this day has arrived. It's been almost 20 years. It was a couple of weeks in early March of 1992 when then Governor Engler appointed Cliff and me to the Michigan Court of Appeals. And I thank you, Governor, for changing the course of my life and of Cliff's life by those appointments.

Cliff and I spent the next 16 years as colleagues on the Court of Appeals and on the Supreme Court. Early on in our career as judges, I was sitting next to Cliff one day at a judicial training seminar. And the goal of the training seminar was that we would learn to become better judges by exploring our personality traits. And I'm sitting next to Cliff and I look over at Cliff's paper to see what he's written. He wrote down the word to describe himself: dutiful. And I thought to myself that was really an odd response for Cliff. I mean, why didn't he write down "witty" or "analytical" or "intellectual"? No, he wrote down "dutiful." And I recognized though, Cliff, that that was really an excellent description of yourself—20 years later. You were steadfast in your work as a judge and a justice. Despite the frequent attacks that were lobbed your way—the relentless attacks lobbed your way—you persevered. You always understood the primacy of the oath that we took, and you honored that oath to support our Constitution and laws.

Over the 20 years that Cliff and I have been friends, I came to appreciate the costs and the rewards of duty—both at work and at home. As many of you know, my late husband, Joe Grano, suffered for 13 years from a chronic, debilitating, and ultimately fatal illness. And that was a difficult journey for my family. One evening about 15 years ago, my then college-age daughter, Megan, had just broken up with her then boyfriend. And that night she and I were having a heart-to-heart

discussion. It's the sort of discussion that you always remember with your children—some stick in your head. And Megan asked me outright that night, "Mom, why do you stay with Dad?" I told her what I learned: that for me, the most important thing in life was keeping my promises, and that I know that if our roles were reversed, that my husband would have done the same thing for me.

Well, these observations about fidelity and commitment are characteristic of Cliff TAYLOR, I think, and how he conducts himself. He believes that keeping promises is paramount above all, and he has lived out his promise to the people of Michigan to the very best of his ability. He used his abundant gifts of mind and heart to decide every case in accordance with our Constitution and our laws, and he was brave and faithful when political expediency would have always been the easier course.

I witnessed on a daily basis that Cliff TAYLOR has a firmly grounded and finely honed notion of what is good. He and I, of course, disagreed many times over the years about how cases should be decided—the cases that came before our Court—but we shared a common commitment to fidelity, to the principles enshrined in our Constitution, the very best framework for governance ever invented in the history of mankind. How privileged we all were, Cliff, to think together for all those years.

CLIFFORD WOODWORTH TAYLOR has forever left his mark on the Michigan Supreme Court. We will always call the years of your tenure "the Taylor Court." Your personal life is equally filled with integrity and purpose. Your marriage of more than 42 years to Lucille stands as testament to the rewards of commitment. I know

there's obstacles when two highly gifted people are in a marriage, but you would never know that by watching Cliff and Lucille.

So Cliff, I congratulate you, and I congratulate the people of Michigan and Governor Engler because you allowed this legacy to be created. And as we unveil this portrait—the beautiful portrait by our wonderful and beautiful friend, Patricia Hill Burnett, of our Supreme Court's 100th justice—I say to you Cliff, thank you for keeping your promises and for doing it for all of us. You have made us very proud.

May God bless you, may God bless the people of Michigan, and God bless America. Thank you, Cliff.

CHIEF JUSTICE YOUNG: And it's my pleasure now to call to the podium, General BILL SCHUETTE, Michigan's Attorney General. It's your duty—sorry, I couldn't help it.

ATTORNEY GENERAL BILL SCHUETTE: May it please the Court. Justices, it's so nice to be in your company. Cliff, what a special day this is for you and your family—Lucille, you're over there—and family members and so many friends.

It's an honor for me to be here and a privilege and an honor to be at this portrait presentation on this special day for CLIFFORD W. TAYLOR. And to be in the company of so many judges, federal and state, General Kelley, seeing Maura and Spence and Wally, Bernie, and Rocky, Governor Engler who's batting cleanup this afternoon, and then your comments, Cliff. It's a special day indeed, and may I say that for some in the state of Michigan—and let me define that as some few misinformed, uninformed folks—have been anxious to hang him for years. And now this day has finally come. We're hanging Cliff TAYLOR. But it is a special day for all of us here and your friends, which are many.

Now we've touched on—and I'm sure Governor Engler will touch on it as well—but so many, when you think about Cliff TAYLOR, we use words like "intellect," "writing skill," "adherence to the rule of law," your decisions—and I've liked all your decisions, except the few times you've overruled me. But that aside, you could add "literate," "likeable," "well informed," so many words—"witty," "erudite," all of those—but here's my takeaway in terms of your impact, your impact on the judiciary. When you think about it, in this Hall of Justice there are 86, 86 portraits. You will be the 87th. Some of these portraits actually are nicely done, some maybe not, but these are all honorable individuals deserving to occupy space in the Hall of Justice.

But I've always felt that public service in the truest sense of the word and the finest sense of the word is not about going through the motions. Public service is not about enjoying the ride. Worse yet, it's not about consuming oxygen or just occupying an office—that's not what public service should be. And Cliff, to your credit, Cliff, you never have gone merrily along. You never consumed oxygen when you served and you didn't just occupy space. On the contrary, you understood so importantly about the dignity of this office. You understood the importance of language. The words mattered. And you understood, maybe most of all, that in a climate where some revisionists wished to alter statutes for their own political means and purposes, that the judiciary, and the Supreme Court most of all, plays critical importance in upholding and protecting and defending the Constitution of the United States and of the great state of Michigan.

So Cliff, the space, the space that your portrait will occupy in this building, in the Michigan Hall of Justice, is of the highest distinction. And your portrait, because

of what you did, elevates the stature of the Hall of Justice and all those who occupy space in the future to the highest levels. Thank you and congratulations.

CHIEF JUSTICE YOUNG: It is now my pleasure to welcome Dean Emeritus Bernard Dobranski, professor of law at Ave Maria Law School.

DEAN BERNARD DOBRANSKI: May it please the Court. Mr. Chief Justice, associate justices, including Associate Justice BRIAN ZAHRA, who I had the pleasure of having as a student—

CHIEF JUSTICE YOUNG: Was it a pleasure?

DEAN DOBRANSKI: Judges, friends, Lucille. It's a privilege and honor to be asked to speak at this program honoring the former Chief Justice, and I'm really grateful for the opportunity to offer my reflections on his remarkable career. The state of Michigan has been blessed with a great tradition of Supreme Court justices—THOMAS COOLEY, of course, and his colleagues, ISAAC CHRISTIANCY, JAMES CAMPBELL , and BENJAMIN GRAVES, the original Gang of Four; JOHN DETHMERS, who should have been on the Supreme Court of the United States instead of William Brennan; G. MENNEN "Soapy" WILLIAMS, a legendary Michigan governor who further distinguished himself, first as a justice and then chief justice of this Court. As an aside, I note that another distinguished justice of this Court, Justice MICHAEL CAVANAGH, who, of course, still serves, had the good fortune to serve with Soapy WILLIAMS. And finally, former Chief Justice MAURA CORRIGAN, whom we've just heard from a few minutes ago.

The man we honor today, former Chief Justice CLIFFORD TAYLOR, not only belongs within this pantheon of judicial greats, but surely is ranked as one of the greatest. While on the Court, Chief Justice TAYLOR was a profoundly learned, incredibly articulate, and fierce defender of the view that judges must interpret the law—whether they

agree with it or not—and not make the law. It is wrong, as he forcefully and capably asserted, for judges, at any time, to twist and shape the law to conform to their personal views or to what they perceive to be the prevailing political winds.

But I'm not here to speak about his tenure as a justice, no matter how distinguished it was. Rather, I want to talk about Chief Justice TAYLOR from a different perspective, one most of you aren't familiar with, from the perspective of a legal educator, more specifically, from two perspectives. The first is as a law school dean. As a dean, I travel extensively, not only in the state of Michigan but also throughout the country, with numerous interactions with other deans, law school professors, judges—including those from other supreme courts—and lawyers. Throughout Justice TAYLOR's tenure on this Court, I was repeatedly asked about the Michigan Supreme Court and how it had emerged—even in the minds of those who disagreed with the thrust of its jurisprudence, and those were mainly the law deans and professors—but has emerged as the most dynamic, innovative in the best sense of the word, and intellectually coherent supreme court in the 50 states. Perhaps the most common observation—again, even from those who disagreed with the Court's direction—is that it was, under Justice TAYLOR's leadership and because of the wisdom of Governor John Engler, the best and most distinguished state supreme court in the country.

The second perspective, and the more personal one, is that as a law professor colleague of now Professor CLIFFORD TAYLOR. Shortly after he stepped down from the Court, he asked me if there was a class or two he might teach at Ave Maria School of Law. The answer, of course, was yes, and my colleagues and I warmly

welcomed him and also his wife, Lucille, to our faculty. Not surprisingly, his performance in the classroom and as a colleague was from the very beginning outstanding. His classes sparkle with excitement, they're intellectually demanding, and they are always sprinkled with his well-known wit—barbed or not, mostly barbed. On the other hand, they still weren't nearly as good as Lucille's classes.

As I was preparing to come here today for today's event, I ran into one of my faculty colleagues, and after I told him why I was coming, he spontaneously described Cliff as the model for the ideal law professor—I think that's the phrase—extremely bright, profoundly knowledgeable in the law, and deeply respected and admired by his students and his faculty colleagues. I can't think of a higher praise for a law professor. It's certainly one I can't improve upon, and I share it completely.

I've known Cliff, as many of you have, as a friend, as a lawyer, as a jurist, and as a law professor for over 20 years. What has always impressed me most about him is not only his obvious intelligence and great knowledge of the law, but more importantly his sense of humor, his moral integrity, his forceful will for what is right and just, and his abundant courage—a virtue which Aristotle claimed is the greatest one. And all of these were done, I might add, with grace and with elegance. So I thank you for inviting me here today, and I thank you, Cliff, for what you've done for the jurisprudence of this great state, our country, and for what you are now doing for our law school. Thank you very much.

CHIEF JUSTICE YOUNG: And now, it's my pleasure to welcome to the podium Clarence Pozza, Jr., a principal at Miller Canfield.

MR. CLARENCE POZZA, JR.: Mr. Chief Justice, associate justices, Mrs. Taylor—Lucille—honored judges, and guests. May it please the Court.

I stand in front of you touched and honored by Cliff's invite today to speak to you on this very special day—the presentation of his portrait. I am humbled to be here to address this Court and guests in this magnificent Hall of Justice where issues are argued and debated at the highest level with stability and a Supreme Court that is among the most respected in the United States. The Hall of Justice that Justice TAYLOR, Governor Engler, and so many of you worked so hard to build and create. A Hall of Justice that if it were situated in difficult parts of the world would perhaps be a way that we could resolve differences and issues without violence, but through argument over law, human rights, and principles.

I feel in many ways like a freshman lawyer arguing or standing before the Court for the first time. But as I prepared these simple remarks, I kept thinking about Cliff TAYLOR, who is a beloved friend and whom I have known since the 1970s. Cliff and I go way back. We trace ties to our beloved alma mater, mutual friends, political activities, and the law. And over all of these years, Cliff has been more than a beloved friend. He's a beloved friend whom I have admired in every way possible. His integrity, his honesty, his intellectual abilities, his ability, and as noted so often today, his wit and charm. A friend that I or others could talk to on any problem or issue where guidance was needed and Cliff would be there to provide help and guidance in a warm, human way and always found a light even in the most difficult problems.

Last year, I'm very delighted to say, our relationship was created—actually, added a new dimension. Cliff

joined all of us at Miller Canfield, and we now practice law together and are professional colleagues. We are blessed to have Cliff with us—all 500 of us at Miller Canfield in our offices here in Michigan, in China, Mexico, Poland, and the many states of the United States—we are blessed to have you here with us. We have been blessed also—I mean Cliff is part of a tradition—I think tradition is the right word; I'm not sure though—that has allowed us to be blessed by many others. Justice MARKMAN came to Miller Canfield after he was United States Attorney and before he became a justice. Senator ROBERT GRIFFIN joined us after he left the Senate and before he became a justice. Justice CONRAD MALLETT started with Miller Canfield and then came back to us after he left the Supreme Court. Senator and Secretary Abraham was with us before he was elected to the Senate. United States District Court Chief Judge Gerald Rosen was with us. And so we have been blessed by having so many wonderful, wonderful folks who have contributed so much to public life in our state and our nation to be with us at Miller Canfield.

Cliff, however, is enriching us now in so many ways. Every day he helps us, not only with clients but on firm issues with his wisdom, his intellect, his historical perspective. But he really contributes where the legal issue, the challenge, is particularly thorny and difficult and where those of us practicing can't see a light. Cliff finds a path and finds a light, even in the most difficult situations, all the while in an intense situation with wit and charm. And for that, we are so blessed at Miller Canfield to have him as part of our team now.

To Lucille, I would be remiss if I did not thank you for sharing this very special man and this very beloved friend with us. We'd like a little more of his time if we can get it from you and the law school. Justice TAYLOR,

congratulations on the presentation of your portrait and all that you have done for the people of the state of Michigan and for our country. Cliff, thank you for being such a dear friend for so long. It's just been great, and I look forward to so many more years. Thank you.

CHIEF JUSTICE YOUNG: And it's now my pleasure to welcome to the podium Honorable John M. Engler, former Governor of Michigan.

MR. JOHN M. ENGLER: Mr. Chief Justice, justices of the Court, Chief Justice Cliff TAYLOR, my great general counsel, Lucille Taylor, members of the Michigan judiciary, lawyers, distinguished former members of the Engler administration, people of Michigan.

What a privilege it is to be back. I am delighted to be back in this building, to have a program where the heading isn't "fill in the blank versus Engler." It's nice to be here to celebrate with Wally Riley, and I certainly want to join Wally with so many people who admire the work of the Michigan Supreme Court Historical Society and the great work that you've done. Really, it's really been a labor of love, but it's also a labor that I think is very important because I think remembering history—it matters. And what you've done for the judicial branch and for this esteemed body is really important. In the view of many of the directors—you know, we won't always have [former Attorney General] Frank Kelley to provide living history for us. You are creating a way for commemorating all of this, and it's just terrific.

It's also a real privilege to be in this beautiful building because DOROTHY RILEY, Jim BRICKLEY, so many others—Cliff TAYLOR, members of this Court, MAURA CORRIGAN, there were many—Mike CAVANAGH was a part of this—in sort of standing together over the years to actually bring this dream into a reality, to have this

beautiful structure completed to close in the capitol complex, to be able to look out the front window, look down through the mall and see the capitol. It's a special building, and I think that we have a Court that is worthy of such a grand building and worthy of all of these portraits that will hang here and commemorate the history of the Court.

Today we gather to honor our 100th justice, a justice that I was privileged to appoint, and as Wally mentioned so kindly in his remarks, to fill the, well tiny shoes, the very large footprints of Justice DOROTHY COMSTOCK RILEY, who was truly one of our outstanding legal minds and great leaders of the judicial branch. And I thought, you know, when you think back to that time and Dorothy had indicated that she was going to step down from the Court, it was the first selection that I was to make to the Supreme Court—the first of what later became three appointments to the Court—and to what goes into that selection of a justice or a judge. As a governor, I ended up being privileged to appoint literally hundreds of judges at the trial court level, and the appellate level, and the Supreme Court.

I had a public service career that began—as Spence talked about his 40-year friendship with CLIFFORD TAYLOR—I actually have a career that goes back, you know, that far plus a little bit now, but it started as a state representative serving in the minority and then ended some 20 years later—the legislative portion at least—as we drew up the majority party in the Senate. Those 20 years gave me a ringside seat in the legislative branch and a deep appreciation for the powers and the roles in each branch of our government, constitutionally assigned. I certainly remember on occasion being frustrated at times by decisions that were taken in both the executive and the judicial branches. You know, when

the Legislature gets to be unhappy with the executive, they've got a lot of tools. They've got other new legislation that they can write and pass. You could have a veto override. You've got the appointment process. You've got a lot of tools. You've even got the budget, if it comes to that. But when you're disagreeing with a judicial decision, what's the recourse? What do you do?

And so, by the time I became Governor, I actually had a few definite views about the judicial branch, about how our Constitution assigned the responsibilities and what qualities I thought were essential in being a good judge or justice. And certainly at the top of my list, given the years of experience in the Legislature and subsequently a number of years of experience in the executive branch, is that judges are not legislators. Senator SCHUETTE was a legislator, but he left that behind and became Judge SCHUETTE. Now he's over in the executive branch; he's kind of hit the cycle here. But in each of those branches, he had specific responsibilities that were his to perform and others that were properly, I've always felt, were the branch he left behind.

Judges certainly are not in charge of the executive branch, justices as well. Justice CORRIGAN now is in charge of a big part of the executive branch, and she had to leave the Court to do it. It would not have been appropriate to do it from here. And I congratulate her for that. Justice ZAHRA is especially happy about that—very excited about your new role. Judges are to—and Rocky mentioned this, but judges really are to—or Bernie mentioned this—they are to interpret the law not make the law—I've always felt that—and they're not to be a second-chance legislative body. I've always felt strongly it wasn't about trying to win the Legislature, if you couldn't win there, then you come here.

Politics are pretty much part of every bit of American life these days, it seems. We had elections—special elections—in congressional districts in Nevada and New York yesterday. A few weeks ago, we had recall elections in Wisconsin. You know, not very many months away in 2012 there'll be presidential, federal elections, state legislative elections here, and there will be, yes, judicial elections in states like Michigan—there'll continue to be judicial elections. And those kinds of campaigns at every level and for different types of office, they do involve issues and debates. Most campaigns are done in an honorable way, others perhaps less so, but once the campaigns are over, the campaigns ought to be over. We've seen in legislative branches and even in the executive branch, sometimes the campaigns become almost permanent. But where that can't be so is in the judiciary because that's where the arbiters are. That's where the independent judicial branch has to be and it seems to me that's key for a court, it's key for somebody who wants to serve on the court.

And so it came to me in not only the appointment of Justice TAYLOR, but in other appointments that I was privileged to make, to look at these qualities and to think about this with a sense of philosophy about what, what might recommend someone, what might really qualify them. And I think, it's been mentioned today, that Cliff TAYLOR is a man of great integrity, and I think we need in our judicial offices across this country at every level men and women of great integrity. I think that's very important. I believe strongly that such men and women—part of integrity is a great and deep appreciation for the rule of law. It is absolutely basic. Legislative bodies ebb and flow with the times, with the influences—there are many—and some of the influences are felt by some to be more desirable than others,

but that's what the political process, the partisan process, is. It's rough and tumble at times. You do win and you do lose. But I think the referee responsibilities, if you will, of the independent judiciary is to call the balls and strikes fairly, not to rewrite the rule book. I think there is something else that's part of Cliff TAYLOR in particular that it would not have been necessarily easy to know in advance, but I came to appreciate this, and it was mentioned again by Bernie Dobranski, his comments about his leadership in the law.

But there's another aspect of that and that's the leadership in the Michigan judicial system itself. And this Court is to be commended for what it has done and for what it's currently doing, Chief Justice YOUNG—a unanimous court speaking out on some of these issues in a way that I think is most helpful to the debate in the state over acute budget problems and trying to look at judicial efficiency, judicial management. Again, I think that the Michigan Supreme Court has been a leader in taking on tough issues over a period of time. Cliff TAYLOR as chief justice did that. Your Court today is doing it as well. And then I think also there's another responsibility that is there. And I think, again, this Court has made steps, and Justice TAYLOR certainly as chief justice was a leader, and it continues to be a work in progress, but it's something that's important to every lawyer in the room and that's the legal profession and its health. The health of the legal profession itself or professionalism and the leadership there, because I think just as governments sometime look for lots of ways to be able to fund their operations, a surplus of lawyers may result in some lawyers cutting corners to try to fund their operations, and I think the Supreme Court is ultimately the body that has to take on the responsibility of upholding the integrity of the legal profession itself. I think Justice TAYLOR on so many of

these important leadership tests stood up, was counted, and performed in a remarkable fashion, and his portrait now will hang here forever reminding us of him.

I had many things to say, but Spence Abraham cut most of them out on the plane—said, You I really can't go there, this is a formal session and we've written down words that will be memorialized forever—so they're gone. I do want to, though, as we think about this and what this sort of significant passage rite, rite of passage, if you will, as the portrait is hung—I mean, sort of the last official Taylor act this Court will deal with. In those reviews that were mentioned about Clifford and Lucille's teaching, I happen to have been privy to at least one student's review. It was reported to me, and I believe the source to be impeccable on this, that one of the students in CLIFFORD TAYLOR's class—Lucille had only superlatives said about her, and, you know, the suggestions that she be cloned immediately to have her quality of instruction be in every classroom in the law school—but for Clifford, the reviews were solid for sure—good—but one student, in sort of complimenting him on the class observed that, "Gosh, he's really old." I guess today we acknowledge he is finally of age, he really is old as we hang his portrait.

Clifford, congratulations on a stellar legal career in the private sector and an outstanding contribution to Michigan judicial history with your public service on the Court of Appeals and on the Supreme Court. And I'm just proud to call you and Lucille and your family dear friends, and I could not be more excited to be able to be in Michigan, to be in this Hall of Justice, to know that your portrait forever will hang here to memorialize what I think has been one of the most outstanding judicial careers that our state has witnessed. Congratulations. Thank you.

CHIEF JUSTICE YOUNG: When you have a face like mine or Cliff's, it is inevitable that you'd want to turn to one of the 10 distinguished portrait artists in the country of the Council of Leading American Painters. And so it was that Cliff selected Patricia Hill Burnett to do his portrait. And we call upon you now to do the honors.

MS. BURNETT: Well, I have to say that of course my most important motto in life is, Never say no unless they ask you if you've had enough. So I'm thrilled at the age of 91 to be invited to Lansing for this portrait dedication of Justice CLIFFORD TAYLOR. I just couldn't refuse coming here.

With all this wisdom sitting before me, I still want to share some of the wisdom I accumulated in 91 years. Here's some of my lifelines, a series of mottos that I've invented or collected over the years. For one thing, they've given me a balance in life, more times than I hate to tell you that I needed. But first of all, trust your instincts. They're your right brain talking. Don't dwell on regrets. Don't cry—oh, this is for women—don't cry over anything that money can buy. Forgive your enemies, but never forget their names. And you keep your friends close and your enemies closer. And if you don't have any enemies, you haven't lived a very wide life, should I say. And my last one is, rise above it all.

So I want to leave you with one profound truth that transcends wealth, poverty, religion, and politics. Mark Twain said, It all comes down to this: no matter how famous you are, no matter how many honors you achieve, money you earn, one thing and one thing alone will determine how many people come to your funeral, and that's the weather. That's it.

CHIEF JUSTICE YOUNG: Now you have to do the unveiling, now. You don't want to do the unveiling?

MS. BURNETT: Oh, yes.

CHIEF JUSTICE YOUNG: Well, you had a great set of remarks.

MS. BURNETT: Could someone give me some help?

CHIEF JUSTICE YOUNG: Can you help her?

[Ms. Burnett unveils the portrait to applause.]

CHIEF JUSTICE YOUNG: Don't get ahead of me, Clifford. Don't get ahead of me now.

As I indicated, Patricia is a very talented artist, able to take what God gave Cliff and improve on it a bit, I should think. Now when Cliff, Clifford, Chief Justice TAYLOR, usually rises to speak, it's after the tomatoes and the brickbats have ceased, to rise in rebuttal. But today, it appears that the body is here at the wake and has only good things to say. Chief Justice CLIFFORD TAYLOR. [Applause.] Excuse me, Clifford, Clifford, excuse me. It appears that you had good weather today.

THE HONORABLE CLIFFORD W. TAYLOR: Well, as at any wake, the honoree gets a bye, and they don't expect him to say anything too much. I'm going to honor that today.

Frank Kelley, who at one point had the good fortune to run against me for Attorney General—the only thing I recall that Frank ever said that was thoughtful and contemplative to me was, "Cliff, never be the only man standing between a crowd and an open bar." And I'm partly in that position now.

Patricia is so charming. I had never had a portrait done before, of course, and so she had painted a wonderful picture of John's triplets, and so I asked her if she would do this. In the course of that, we got to know each other, and all of the charm and pleasantness that you saw today is the normal fare of Patricia Hill Burnett. I still recall her telling me at the time she showed me this wonderful painting, "Do you know what

the three worst words for a portraitist are at work?" I said, "What?" "Who is that?"

Now this painting has not been in real isolation, this has been sitting in a hallway in our house and has been the subject of any number of irreverent comments. We were having a neighborhood party one evening, and one of the little boys from the neighborhood wandered in and his mother said, "Do you know who that is?" He said, "I think it's Bill Clinton." I've never told Patricia that, that would really have undone her. My youngest son, John, had the best comment about it, which was, "You know, Dad, this is what you looked like when we asked for the family car."

Well—you know, one of the unheralded benefits of serving on this Court is that you get to have a dress rehearsal for your funeral—only it's slightly better because if the eulogists get too frisky, you've got your remaining years to get even. And I don't have too much to get even for. There's a real talent for fiction that is on display here, and I appreciate it. I will say one thing. I'm somewhat unsettled about the fact that no one managed to recall my heroic naval career. But that would have taken more talent than these folks have; it's not easy to weave a tapestry of heroism out of a career spent in the Caribbean.

Now, I'd like to thank the Court for taking time to go through this today and for the pleasant things that everyone said here today. And I'm, of course, anticipating that Steve MARKMAN will perform well in a few moments, so I appreciate what you're going to say, too, Steve, although I do wish you'd stop writing.

I want to thank the Supreme Court Historical Society. Wally and I and Dorothy and Lucille were friends for years and years. What Wally and Dorothy did with the Historical Society is really to, in many respects,

instill a sense of patrimony into our state and this great Court. And for this, Wally, you are to be greatly thanked.

I want to also thank Colleen Pero—my sidekick through hundreds of political capers and this one today—who has been the organizer at our end of this, and she really has been her usual self, which is, simply stated, the world's most capable person.

I'd like to also thank Miller Canfield Paddock and Stone—the law firm that I am with—and they have been very generous with me. You know, one of the things that I'm asked to do in this post is to sort of give people an idea about what might move this group. And generally, it's full of very long and elaborate words, but at the risk of giving up a trade secret, let me just sort of give you the idea of it. If you've got a case before this Court and it involves a statute, or a constitutional provision, or a contract, or a bill of lading, you parse it like a tedious grammarian—and then get a couple unions to file amicus on your side, and you'll have a unanimous court.

I want to thank Bernie Dobranski, who came here to represent the law school, and is also our longtime friend. Thank you, Bernie, I've enjoyed the time at the law school. I've enjoyed teaching. I haven't enjoyed it as much as Lucille has because she's been getting these reviews that are more encouraging.

Maura, thank you for being here. You're, as always, a great and loyal friend, and I appreciate all your kindnesses, and I look back on the years we spent together. Maura used to always say to me—I never quite knew what this meant—but she'd always say to me, "You know, Cliff, we're going to live down the hall from each other in an old folks' home someday." And I always thought, Actually that would be fun, and I wonder why.

BILL SCHUETTE, you currently serve, of course, as our Attorney General—doing a wonderful job—Bill has been my friend in the world of politics for a long, long time. Thank you for coming, Bill, and I appreciate your kind and wonderful thoughts.

Spencer behaved himself today, and this was really a source of some consternation to me. He sent me an e-mail suggesting three topics that he might be discussing. That took care of a couple of evenings of sleep, but I had every confidence in the end that Spencer would be kind and gentle, and he was, and thank you very much, sir.

John Engler has been the friend of Lucille and me for 40 years. He's a wonderful guy, and I'm greatly honored to have had your appointment to this Court and the Court of Appeals, and I'm pleased that you think that I have carried out that responsibility well.

Finally, I'd like to thank Lucille and my children and my family for being here and for all the help and support that they have been with me over the years.

I've enjoyed my time as a judge. Actually, I've enjoyed my life a lot; I've enjoyed almost everything I've done in my life. I've never had the sad circumstance of getting up and dragging to work in the morning and not liking what I was going to do. And of all the things I did, I found the Supreme Court the most intellectually rewarding, and many, many of you were very instrumental in that, either by redirecting me, criticizing me, or by filing briefs that were on target and very thoughtful and helpful.

And finally, to my former colleagues—after all these years, four of you still survive—and I must say that as I look back on that time, candidly, I'm still dismayed that some of you couldn't figure out the wisdom of the positions that I was advancing. But I look back on the

fact that all of us did our best to serve—in the phrase of the old Michigan song—the Goddess of the Inland Seas. Thank you.

[Applause.]

CHIEF JUSTICE YOUNG: Now we've seen it, it appears that we have to accept it. Justice MARKMAN, having gotten the short straw, is going to do that duty now. Justice MARKMAN.

JUSTICE STEPHEN J. MARKMAN: Thank you, Mr. Chief Justice. I am strategically positioned on this program where I now get to speak and Justice TAYLOR gets no further chance to speak, and I appreciate that position.

It is an honor on behalf of the Court—the Michigan Supreme Court—to accept this portrait of Justice CLIFFORD TAYLOR. And, no, it was not a 4 to 3 vote to accept the portrait. Patricia Hill Burnett has produced an outstanding portrait and it will grace our Hall of Justice for as long as our Hall of Justice graces our capitol city and our state. And I congratulate Ms. Burnett on behalf of the Court for her artistry, and I congratulate Justice TAYLOR for having sat still long enough to allow Ms. Burnett to perform this artistry.

There's really very little that I can add to the many accolades that have been directed toward Cliff TAYLOR this afternoon. But I thought hard about this, and I believe it's probably worth mentioning that he dresses very well and he's generally a safe driver. You know, I thought about it, and I feel that these are very worthy attributes and they shouldn't be overlooked in the midst of all the other laudatory things that we've heard about Cliff TAYLOR today.

The legacy of any justice of this Court is inevitably reflected best, I believe, in this series of books, the *Michigan Reports*, in which our orders and opinions are

permanently memorialized. The exercise of judgment on the part of the justice, the judicial principles, the craftsmanship, the persuasiveness of analysis, and the commitment to the great propositions of our constitutional system—the equal rule of law and the separation of powers—these are all on display in these volumes. And Justice TAYLOR's legacy speaks for itself and, of course, can be judged by any person who chooses to take these volumes off the shelf and peruse them.

What, however, can't be so simply assessed are the deliberative processes by which Cliff TAYLOR came to reach his positions and to give meaning to the law. And as his colleague on this Court for a decade and as his friend for a quarter of a century before that, these deliberative processes will always most indelibly mark his work as a justice for me. And most of all in this regard, I recall his remarkable and genuine open-mindedness to opposing positions and arguments, his willingness to adjust and even abandon established positions on the basis of discussion and back-and-forth debate, and certainly his intellectual curiosity and his interest in discussing and rediscussing our most difficult cases. There is never a moment at which Cliff TAYLOR was not prepared for as long as necessary to discuss how a case should fairly and properly be resolved. He was, of course, never willing to compromise as to his first principles—these were simply part of his DNA—but he was always prepared to accept that he might either be viewing a case or his principles from the wrong perspective, and he enjoyed nothing more than being persuaded by and persuading others through the give-and-take of legal argument. And there was no justice who was more resolute in recognizing that ours is a court of law and that its legal rules could not be properly articulated without careful consideration of their impact upon tomorrow's cases. I once described

Cliff as the king of hypotheticals, wherein by the Socratic process of asking a series of questions about hypothetical future cases, each involving slightly different fact patterns, he encouraged me and his other colleagues to consider the impact of today's opinions and today's legal rules upon cases that might be filed tomorrow or the day after.

To me Cliff TAYLOR was the epitome of a judge fully and deeply engaged in his work, fully and deeply engaged in all that he did on cases great and small. And he brought to the Court a unique blend of practical experience drawn from his 20 years of general practice in a small law firm in this community, combined with an extraordinarily sophisticated and consistent commitment to a judicial philosophy that had clearly animated, as Senator Abraham mentioned, his interest in judicial service and that he believed was required by our constitutional heritage. Cliff's insights, both those drawn from his experiences at Denfield, Timmer, and Taylor, and those drawn from his studies and reflections concerning the nature of the judiciary, have been remarkably influential and often dispositive in resolving an uncountable number of cases in his more than 11 years on this Court.

I must also briefly mention Cliff TAYLOR's specific legacy as chief justice of this Court for four years. He was the author of the procedure by which this Court now hears a greater number of oral arguments from the parties each term, in which more parties get to speak directly to the Court in their cases. At his initiative, the Court embarked upon the most ambitious and comprehensive jury reform proposal in the country, recently enacting these into law. He exercised unusual leadership in his recognition of the increasingly limited budgetary resources that were available to the courts of this

state. And he worked to accommodate these new fiscal realities without impairing the core mission of the judiciary. Working with Wally Riley and the court historical society, he established the Advocate Society in an effort to enhance the caliber of appellate advocacy before this Court. He introduced our Community Connections Program by which the Court now on a regular basis each term hears oral arguments in communities across the state—outside of Lansing—and combines these arguments with related educational activities in the local school districts. And perhaps most importantly on a day-by-day basis, Cliff TAYLOR supplied the leadership—honest and always incorruptible—and brought the maturity to this Court allowing it, I believe, to become the very best court that it could be, and in many ways, I believe, a very courageous court.

You know there's a time capsule that rests in our main lobby, and most of you I think have passed it when you came into this building. When it's finally opened on October 8, 2102, only 91 years from now—and I'm very much looking forward to that occasion—I believe that the passage of time will have confirmed that Cliff TAYLOR was both a special justice and a special chief justice, an historically important and memorable justice, and I believe that the passage of time will have equally confirmed that Ms. Burnett's portrait is one for the ages. Thank you very much.

CHIEF JUSTICE YOUNG: Well, Mr. Chief Justice TAYLOR, this has been a wonderful occasion for all of us to remember you and to reflect on your legacy, not only to this body but to the state of Michigan. I'm glad you had a good day. Thank you all very much.

SUPREME COURT CASES

HAMED v WAYNE COUNTY

Docket No. 139505. Argued January 19, 2011 (Calendar No. 4). Decided July 29, 2011.

Tara K. Hamed brought an action in the Wayne Circuit Court against Wayne County, the Wayne County Sheriff's Department, former Wayne County sheriff's deputy Reginald Johnson, and others, alleging various claims of gross negligence after Johnson sexually assaulted her during her detention at the Wayne County jail. Plaintiff amended her complaint to include claims under the Civil Rights Act (CRA), MCL 37.2101 *et seq*., specifically, claims of quid pro quo and hostile-environment sexual harassment under MCL 37.2103(i). The county and the sheriff's department (hereafter defendants) moved for summary disposition. The court, Michael F. Sapala, J., granted defendants summary disposition, dismissing all of plaintiff's civil rights claims, concluding with respect to plaintiff's claim of quid pro quo sexual harassment that defendants could not be held vicariously liable for the criminal acts of sheriff's department employees under traditional common-law principles of respondeat superior. Plaintiff appealed, and defendants cross-appealed. The Court of Appeals, BORRELLO, P.J., and METER and STEPHENS, JJ., reversed and remanded for further proceedings, holding that defendants could be held liable for quid pro quo sexual harassment under a theory of respondeat superior, applying the analysis of *Champion v Nation Wide Security, Inc*, 450 Mich 702 (1996), to plaintiff's case. 284 Mich App 681 (2009). The Supreme Court granted defendants' application for leave to appeal. 486 Mich 996 (2010).

In an opinion by Justice MARY BETH KELLY, joined by Chief Justice YOUNG and Justices MARKMAN and ZAHRA, the Supreme Court *held*:

A provider of a public service may not be held vicariously liable for quid pro quo sexual harassment affecting public services on the basis of the unforeseeable criminal actions its employee committed outside the scope of his or her employment under the CRA and traditional common-law principles of respondeat superior. Because *Champion* wrongly held to the contrary, pursuant to stare decisis principles, it is overruled.

1. The CRA prohibits discrimination because of sex in employment, places of public accommodation, and public services. MCL 37.2103(i) defines "discrimination because of sex" as including quid pro quo sexual harassment, in which submission to or rejection of unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct or communication of a sexual nature is explicitly or implicitly made a term or condition of obtaining public services or used as a factor in decisions affecting the receipt of public services. Accordingly, a plaintiff alleging quid pro quo sexual harassment affecting public services must show by a preponderance of the evidence (1) that he or she was subjected to any of the types of unwelcome sexual conduct or communication described in the statute and (2) that the public-service provider or the public-service provider's agent made submission to the proscribed conduct a term or condition of obtaining public services or used the plaintiff's submission to or rejection of the proscribed conduct as a factor in a decision affecting his or her receipt of public services. When the harassment was committed by an agent and the plaintiff is pursuing a civil rights claim against the principal, a court must determine the extent of the principal's vicarious liability using common-law agency principles, which the CRA specifically incorporated. If a defendant would not be vicariously liable for the acts of its agent under traditional principles of respondeat superior, the plaintiff's claim under the CRA fails as a matter of law.

2. Under the doctrine of respondeat superior, an employer is generally liable for the torts its employees commit within the scope of their employment, but not for those torts that are beyond the scope of the employer's business. An act is considered within the scope of employment if the employee was engaged in the employer's service and accomplished the act in furtherance or in the interest of the employer's business, even if the act was contrary to the employer's instructions, but not if the employee acted independently and solely to further the employee's individual interests. In this case, Johnson's sexual assault of plaintiff was beyond the scope of his employment because it was an independent action undertaken solely in furtherance of Johnson's own interests.

3. An employer may be held liable for acts of its employees outside the scope of its business in certain instances, but the employer's liability for the torts of its employees is limited to those acts it can reasonably foresee or reasonably should have foreseen. An act is foreseeable if the employer had (1) actual or constructive knowledge of prior similar conduct and (2) actual or constructive knowledge of the employee's propensity to act in accordance with that conduct. If the conduct at issue happened close in time to prior

similar conduct, an employer's knowledge of that conduct would give rise to a valid inference that the conduct was foreseeable, whereas if an employee's actions were temporally distant and the employee's recent record suggested a change in character, foreseeability would not be established. Imposing liability for unforeseen and unforeseeable criminal actions would create an unfair societal burden on employers, potential employees, and public-service providers. In this case, defendants were not legally responsible for Johnson's criminal acts because his previous misconduct, at most, gave defendants notice that Johnson had a propensity to disobey work-related protocol and engage in aggressive behavior when provoked. Because Johnson's prior misconduct was not similar to the violent sexual assault he perpetrated against plaintiff, defendants had no actual or constructive knowledge that Johnson would engage in criminal sexual misconduct and defendants therefore may not be held vicariously liable for quid pro quo sexual harassment under traditional principles of respondeat superior.

4. *Champion* held that an employer is strictly liable if a supervisor accomplished a rape through the exercise of supervisory power over the victim, citing the aided-by-agency exception to the general rule that employers are not liable for torts committed outside the scope of employment. However, the Supreme Court has never held a principal vicariously liable for the unforeseeable acts of an agent committed outside the scope of employment except under the limited circumstances of the civil rights matter in *Champion*. *Champion*'s holding was contrary to the plain language of the CRA. The CRA specifically incorporated common-law agency principles in its definition of "employer," but Michigan's common-law agency principles do not include the aided-by-agency exception to respondeat superior that *Champion* adopted, nor did the Legislature modify the common law by including the aided-by-agency exception in the CRA. Accordingly, *Champion* was wrongly decided and pursuant to stare decisis principles must be overruled.

Reversed; summary disposition reinstated.

Justice CAVANAGH, joined by Justice MARILYN KELLY, dissenting, stated that he disagreed with the majority's decision to overrule *Champion* because it was correctly decided, it furthered the legislative intent and purpose of the CRA, and the doctrine of stare decisis weighed against overruling it. He further stated that the majority had usurped the role of the jury by misapplying its newly created standard to conclude that defendants were entitled to a favorable decision as a matter of law.

Justice HATHAWAY, dissenting, joined all but part III of Justice CAVANAGH's dissent and wrote separately to state her belief that

Champion was correctly decided and served to protect the rights of victims of discrimination. She further stated that the majority's decision significantly undermined the legislative intent that employers rather than the victims of sexual harassment bear the costs of remedying and eradicating discrimination and would result in dismantling the CRA.

CIVIL RIGHTS — SEXUAL HARASSMENT — PUBLIC SERVICES — QUID PRO QUO SEXUAL HARASSMENT — RESPONDEAT SUPERIOR.

A public-service provider may not be held vicariously liable under the Civil Rights Act for quid pro quo sexual harassment affecting public services on the basis of unforeseeable criminal acts that its employee committed outside the scope of his or her employment; an act is considered within the scope of employment if the employee was engaged in the employer's service and accomplished the act in furtherance or in the interest of the employer's business, but not within the scope of employment if the employee acted independently and solely to further the employee's individual interests; an act is foreseeable if the employer had actual or constructive knowledge of prior similar conduct and actual or constructive knowledge of the employee's propensity to act in accordance with that conduct; if the conduct at issue occurred close in time to prior similar conduct, an employer's knowledge of that prior conduct may give rise to a valid inference that the conduct was foreseeable, whereas if an employee's actions were temporally distant and the employee's recent record suggested a change in character, foreseeability would not be established (MCL 37.2103[i]).

Elmer L. Roller P.C. (by *Elmer L. Roller*), *Brian Lavan & Associates, P.C.* (by *Brian Lavan*), and *Gary P. Supanich PLLC* (by *Gary P. Supanich*) for Tara K. Hamed.

Zausmer, Kaufman, August, Caldwell & Tayler, P.C. (by *Mark J. Zausmer* and *Carson J. Tucker*), for Wayne County and the Wayne County Sheriff's Department.

Amici Curiae:

Cohl, Stoker & Toskey, P.C. (by *Peter A. Cohl* and *Richard D. McNulty*), for the Michigan Association of Counties.

Mellon Pries, P.C. (by *James T. Mellon* and *David A. Kowalski*), for the Michigan Municipal Risk Management Authority.

O'Connor, DeGrazia, Tamm & O'Connor, P.C. (by *Julie McCann O'Connor* and *Elizabeth L. Wilhelmi*), for the Michigan Municipal League and the Michigan Municipal League Liability & Property Pool.

Johnson, Rosati, LaBarge, Aseltyne & Field, P.C. (by *Marcelyn A. Stepanski*), for Michigan Defense Trial Counsel.

Linderman Law P.C. (by *Marla A. Linderman*) for the Michigan Association for Justice.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Heather S. Meingast* and *Ann Sherman*, Assistant Attorneys General, for the Attorney General.

Nacht, Roumel, Salvatore, Blanchard & Walker, P.C. (by *Jennifer B. Salvatore*), for the Women Lawyers Association of Michigan.

MARY BETH KELLY, J. We granted leave to appeal in this case to determine the scope of an employer's vicarious liability for quid pro quo sexual harassment affecting public services under Michigan's Civil Rights Act (CRA).[1] Specifically, we consider whether Wayne County and its sheriff's department may be held vicariously liable for a civil rights claim under MCL 37.2103(i) based on a criminal act of a deputy sheriff committed during working hours but plainly beyond the scope of his employment. We hold that defendants may not be held vicariously liable for quid pro quo

[1] MCL 37.2101 *et seq*.

sexual harassment affecting public services under traditional principles of respondeat superior. Accordingly, we reverse the Court of Appeals' judgment and reinstate the circuit court's order granting summary disposition in defendants' favor.

I. FACTS AND PROCEDURAL HISTORY

In August 2001, Livingston County deputy sheriffs arrested plaintiff, Tara Katherine Hamed, on a warrant for unpaid child support. Because plaintiff also had outstanding warrants for probation violations in Wayne County, the Livingston County deputies later transferred plaintiff to the custody of Wayne County. Wayne County deputies transported plaintiff to the Wayne County jail. When plaintiff arrived at the jail, Deputy Reginald Johnson was the only officer on duty in the inmate registry area.[2] While alone with plaintiff, Johnson subjected her to sexually charged comments and offers for better treatment in exchange for sexual favors. Plaintiff resisted these advances, but Johnson transferred plaintiff into an area of the jail not subject to surveillance cameras and sexually assaulted her. Shortly thereafter, a female deputy transported plaintiff to another part of the jail. After her release, plaintiff reported the incident to departmental authorities. The Wayne County Sheriff's Department terminated Johnson's employment, and the state subsequently charged Johnson with criminal sexual conduct, of which he was ultimately convicted.[3]

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[2] Wayne County jail regulations require that a female officer be in attendance when female inmates are present. The officers who transported plaintiff to the jail informed a supervisor that Johnson was the only deputy on duty. The supervisor advised the officers to leave plaintiff with Johnson.

[3] See MCL 750.520c(k).

In 2003, plaintiff filed a complaint against Johnson, Wayne County, the Wayne County Sheriff's Department, and the Wayne County Sheriff, among others, alleging various claims of gross negligence.[4] In 2006, plaintiff moved to amend her complaint, adding civil rights claims of quid pro quo and hostile-environment sexual harassment pursuant to MCL 37.2103(i). Defendants then moved for summary disposition under MCR 2.116(C)(8) and (10), arguing that, under the CRA, jails are excluded from liability and, because defendants had no notice of Johnson's sexually harassing conduct, they could not be vicariously liable for his actions.

The circuit court granted defendants summary disposition in two separate orders and dismissed all of plaintiff's civil rights claims. It concluded that plaintiff's hostile-environment claim failed because defendants had no prior notice that Johnson was a sexual predator. The circuit court also dismissed plaintiff's quid pro quo sexual harassment claim on the basis that defendants are not vicariously liable for the criminal acts of sheriff's department employees.[5]

Plaintiff then appealed the circuit court's decision only with regard to her quid pro quo sexual harassment claim. The Court of Appeals reversed and applied this Court's analysis in *Champion v Nation Wide Security, Inc*,[6] to hold that "[e]mployers are vicariously liable for acts of quid pro quo sexual harassment committed by their employees when those employees use their super-

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[4] The only remaining defendants are Wayne County and the Wayne County Sheriff's Department. Plaintiff received a default judgment against Johnson; Johnson, while a defendant in plaintiff's action, is not a party to this appeal. Thus, for the purposes of this opinion, our references to "defendants" encompass only the institutional defendants.

[5] See *Zsigo v Hurley Med Ctr*, 475 Mich 215; 716 NW2d 220 (2006).

[6] *Champion v Nation Wide Security, Inc*, 450 Mich 702; 545 NW2d 596 (1996).

visory authority to perpetrate the harassment."[7] The Court of Appeals held that plaintiff had established a viable quid pro quo sexual harassment claim because "Johnson used his authority as a sheriff's deputy to exploit plaintiff's vulnerability . . . ."[8] We granted leave to consider whether defendants may be held vicariously liable for quid pro quo sexual harassment affecting public services under MCL 37.2103(i).[9]

II. STANDARD OF REVIEW

We review de novo whether the Court of Appeals erred by reversing the circuit court's grant of summary disposition.[10] Whether defendants may be held vicariously liable for quid pro quo sexual harassment affecting a public service under the CRA is a question of law that we review de novo.[11] To the extent that defendants' arguments require us to interpret the meaning of the CRA, our review is also de novo.[12] When interpreting the meaning of a statute, we discern the Legislature's intent by examining the language used.[13] We read the statutory language in context and as a whole, considering the plain and ordinary meaning of every word.[14] If the language is clear and unambiguous, then we apply the statute as written without judicial construction.[15]

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[7] *Hamed v Wayne Co*, 284 Mich App 681, 693; 775 NW2d 1 (2009).

[8] *Id*.

[9] *Hamed v Wayne Co*, 486 Mich 996 (2010).

[10] *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

[11] See *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002).

[12] *Id*.

[13] *Danse Corp v Madison Hts*, 466 Mich 175, 181-182; 644 NW2d 721 (2002).

[14] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[15] *Danse Corp*, 466 Mich at 182.

III. ANALYSIS

A. QUID PRO QUO SEXUAL HARASSMENT UNDER THE CRA

The CRA recognizes that freedom from discrimination because of sex is a civil right.[16] Accordingly, the act prohibits discrimination because of sex in employment, places of public accommodation, and public services.[17] MCL 37.2103(i) broadly defines "discrimination because of sex" as follows:

> Discrimination because of sex includes sexual harassment. Sexual harassment means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature under the following conditions:
>
> (*i*) Submission to the conduct or communication is made a term or condition either explicitly or implicitly *to obtain* employment, public accommodations or *public services*, education, or housing.
>
> (*ii*) Submission to or rejection of the conduct or communication by an individual *is used as a factor in decisions affecting the individual's* employment, public accommodations or *public services*, education, or housing.
>
> (*iii*) The conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment. [Emphasis added.]

The first two subdivisions of MCL 37.2301(i) describe quid pro quo sexual harassment, while the third subdivision

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[16] MCL 37.2102(1).

[17] MCL 37.2202 (employment); MCL 37.2302 (public accommodations and public services). For purposes of this opinion, we assume, without deciding, that the Wayne County jail is a "public service" as defined by MCL 37.2301(b).

refers to hostile-environment sexual harassment.[18]

A plaintiff alleging quid pro quo sexual harassment affecting public services must show by a preponderance of the evidence (1) that he or she was subjected to any of the types of unwelcome sexual conduct or communication described in the statute and (2) that the public service provider or the public service provider's agent made submission to the proscribed conduct a term or condition of obtaining public services or used the plaintiff's submission to or rejection of the proscribed conduct as a factor in a decision affecting his or her receipt of public services.[19]

When the harassment was committed by an agent and the plaintiff is pursuing a civil rights claim against the principal, as in this case, a court must always "determine the extent of the employer's vicarious liability . . . ."[20] We require this analysis because the CRA specifically incorporates common-law agency principles.[21] Thus, if a defendant is not vicariously liable for the acts of its agent under traditional principles of respondeat superior, the plaintiff's claim under the CRA fails as a matter of law.

B. RESPONDEAT SUPERIOR

The doctrine of respondeat superior is well established in this state: An employer is generally liable for

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[18] *Chambers v Trettco, Inc*, 463 Mich 297, 310; 614 NW2d 910 (2000).

[19] See *id.* (stating the test for quid pro quo sexual harassment in the employment context). For purposes of our analysis, we also assume, without deciding, that plaintiff can establish the elements of quid pro quo sexual harassment affecting public services.

[20] *Id.* at 311.

[21] *Id.* We reached this conclusion in *Chambers* because MCL 37.2201(a) "expressly defines 'employer' to include agents," thereby incorporating common-law agency principles into the act. *Chambers*, 463 Mich at 311.

the torts its employees commit within the scope of their employment.[22] It follows that "an employer is not liable for the torts . . . committed by an employee when those torts are beyond the scope of the employer's business."[23] This Court has defined "within the scope of employment" to mean " 'engaged in the service of his master, or while about his master's business.' "[24] Independent action, intended solely to further the employee's individual interests, cannot be fairly characterized as falling within the scope of employment.[25] Although an act may be contrary to an employer's instructions, liability will nonetheless attach if the employee accomplished the act in furtherance, or the interest, of the employer's business.[26]

Here, there is no question that Johnson's sexual assault of plaintiff was beyond the scope of his employment as a deputy sheriff. The sexual assault was an independent action accomplished solely in furtherance of Johnson's own criminal interests. It cannot be said that any of the institutional defendants benefited in any way from Johnson's criminal assault or his exercise of unlawful authority over plaintiff. In fact, Johnson's behavior was expressly prohibited by defendants' rules regarding treatment of detainees and defendants' antidiscrimination policies, to say nothing of the criminal law. In short, there is no fair basis on which one could

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[22] See, e.g., *Zsigo*, 475 Mich at 221; *Bradley v Stevens*, 329 Mich 556, 562; 46 NW2d 382 (1951); *Martin v Jones*, 302 Mich 355, 358; 4 NW2d 686 (1942); *Davidson v Chinese Republic Restaurant Co*, 201 Mich 389, 396; 167 NW 967 (1918).

[23] *Zsigo*, 475 Mich at 221.

[24] *Barnes v Mitchell*, 341 Mich 7, 13; 67 NW2d 208 (1954), quoting *Riley v Roach*, 168 Mich 294, 307; 134 NW 14 (1912).

[25] 2 Restatement Agency, 3d, § 7.07, p 201.

[26] See *Barnes*, 341 Mich at 13-16 (examining cases discussing scope of employment).

conclude that the sheriff or county themselves vicariously took part in the wrongful acts.

The general rule that an employer is not liable for acts of its employee outside the scope of its business, however, does not preclude vicarious liability in every instance. This Court has consistently recognized that an employer can be held liable for its employee's conduct if "the employer 'knew or should have known of [the] employee's *propensities and criminal record*' " before that employee committed an intentional tort.[27] This inquiry involves an analysis of whether an employer had (1) actual or constructive knowledge of prior similar conduct and (2) actual or constructive knowledge of the employee's propensity to act in accordance with that conduct. Under this two-pronged approach, the conduct at issue may be so close in time to prior similar conduct that knowledge under the first prong gives rise to a valid inference that the conduct was foreseeable under the second prong. Conversely, if an employee's actions were temporally distant and the employee's recent record suggested a change in character, foreseeability would not be established.[28]

We applied this principle in *Brown v Brown*, in which we held that the employer was not vicariously liable for a rape committed by its employee because, under the circumstances, the act was unforeseeable.[29] There, the

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[27] *McClements v Ford Motor Co*, 473 Mich 373, 381; 702 NW2d 166 (2005), quoting *Hersh v Kentfield Builders, Inc*, 385 Mich 410, 412; 189 NW2d 286 (1971) (quotation marks omitted) (emphasis added).

[28] This analysis does not, as the dissenting justices assert, abandon prior caselaw to hold that "an employee's conduct is only foreseeable to an employer if the employee had recently committed the precise conduct at issue." *Post* at 56 n 20. This criticism mischaracterizes the inquiry that must be undertaken, which has its roots in well-established caselaw. See *McClements*, 473 Mich at 381; *Hersh*, 385 Mich at 412.

[29] *Brown v Brown*, 478 Mich 545, 554-555; 739 NW2d 313 (2007).

defendant's employee repeatedly made sexually offensive comments to the plaintiff, a female coworker. The plaintiff reported the incidents to the defendant, yet it took no action, and the employee subsequently raped the plaintiff. In concluding that the employer was not vicariously liable, we noted that the employee had no prior criminal record and had never threatened to rape the plaintiff. We explained:

> [An employer] cannot reasonably anticipate that an employee's lewd, tasteless comments are an inevitable prelude to rape if those comments did not clearly and unmistakably threaten particular criminal activity that would have put a reasonable employer on notice of an imminent risk of harm to a specific victim. Comments of a sexual nature do not inexorably lead to criminal sexual conduct any more than an exasperated, angry comment inexorably results in a violent criminal assault.[30]

In summary, we have consistently held that an employer's liability for the criminal acts of its employees is limited to those acts it can reasonably foresee or reasonably should have foreseen. This is because we should not expect employers to assume that their employees will disobey the law. Criminal conduct is inherently arbitrary and highly unpredictable. As we noted in *Brown*, even law enforcement agencies, which are trained in detecting and preventing crime, cannot pre-

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[30] *Id*. at 555. *Brown* did not, as the dissenting justices state, "conclude[] that an employee's prior violent criminal acts are generally sufficient to put a defendant on notice of the employee's propensity to commit similar violent acts . . . ." *Post* at 57. Rather, *Brown* made clear that knowledge of prior violent acts *potentially* provides an employer notice of an employee's violent propensities. *Brown*, 478 Mich at 561. The dissenting justices attempt to broaden the holding in *Brown* to justify their position that defendants' knowledge of Johnson's dissimilar prior violent act suffices to create a question of fact regarding foreseeability.

dict the occurrence of criminal acts.[31] Contrary to plaintiff's argument, our caselaw governing the imposition of vicarious liability on an employer requires more than simply the exercise of some form of authority by an employee. Thus, it would be anomalous to adopt a rule requiring employers that provide public services to protect against the criminal actions of their employees absent some indicia of foreseeability. Rather, foreseeability is a necessary element for imposing liability, and, as we recently stated in *Brown*, we decline to "transform the test of foreseeability into an 'avoidability' test that would merely judge in hindsight whether the harm *could have been* avoided."[32]

Michigan's well-established rules governing respondeat superior are further justified by the societal burden that imposing liability for unforeseen criminal

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[31] *Id*. at 554, citing *MacDonald v PKT, Inc*, 464 Mich 322, 335; 628 NW2d 33 (2001).

[32] *Brown*, 478 Mich at 556. An "avoidability test" is the type of test the dissenting justices favor. In their view, defendants' policy prohibiting male deputies from being alone with female inmates demonstrates, in itself, that the sexual assault was preventable and foreseeable. However, reliance on the policy alone to impose liability obliterates any real foreseeability requirement; an employer's policy is irrelevant to assessing what the employer knows with respect to a specific employee. The consequence would be imposition of vicarious liability every time an employee disobeys the employer's policy, regardless of whether the act was unforeseeable under the actual circumstances.

Rather, as we have explained, a defendant's specific knowledge of past misconduct and propensity to act in conformity with such conduct must be the focus of a foreseeability analysis. This analysis, which the dissenting justices term a "newly imposed foreseeability analysis," *post* at 58, merely recognizes that foreseeability has always been the touchstone for when vicarious liability will be imposed. The criticism by the main dissent is not surprising, given that Justice CAVANAGH has previously expressed support for what effectively amounts to the imposition of strict liability in lieu of a foreseeability analysis. See *Brown*, 478 Mich at 570-580 (CAVANAGH, J., dissenting); *Anderson v Pine Knob Ski Resort, Inc*, 469 Mich 20, 30-35; 664 NW2d 756 (2003) (CAVANAGH, J., dissenting).

actions would create. Not only would holding employers vicariously liable for such acts be unfair, but doing so would attempt to further an impossible end by requiring employers to prevent harms they cannot anticipate, which are, in essence, unpreventable. The result would be the implementation of burdensome and impractical regulations meant to oversee employee conduct. Yet because such measures are sure to fail given that criminal conduct by its nature cannot be anticipated or foreseen, employers would essentially become insurers responsible for recompensing victims for the criminal acts of their employees. The harm of adopting such a policy would also extend to potential employees with less than impeccable personal backgrounds, who would encounter barriers to employment because employers, out of an abundance of caution, would be less willing to employ these individuals out of fear that *any* prior indiscretion could be used in a lawsuit to impute knowledge to the employer that it did not have.[33]

Applying the foreseeability analysis in this case dictates the conclusion that defendants are not legally responsible for Johnson's criminal acts. The majority of complaints against Johnson during his employment with defendants

[33] For a catalogue of some of the difficult questions that would confront an employer operating under the dissenting justices' rule, see *Brown*, 478 Mich at 566-570 (MARKMAN, J., concurring). "The rule proposed by the dissent, and the unanswered questions arising from that rule, would create confusion and uncertainty among employers throughout this state . . . ." *Id*. at 566. And employers would not be the only ones to suffer; employees would suffer as well because, were the dissenting justices' rule to become law, what rational employer would ever hire anybody with any history of problems in his or her background? "Why would any rational employer expose itself to the vagaries of litigation-by-hindsight . . . where it fails to predict unpredictable behavior if this could all be avoided by simply firing [or failing to hire] every odd or rude or quirky employee?" *Id.* at 569-570. The rule the dissenting justices propose would result in those with imperfect criminal histories, or even merely a history of arrests, becoming increasingly unemployable.

involved his failure to obey work-related policies, such as failure to report a change of home address, or unsatisfactory work performance, for example, temporarily leaving his work station while on duty. Some of the grievances filed against Johnson reflected more serious behavior, such as using a police vehicle without authorization to deliver baby formula to his home, allegedly making threatening calls to his landlord after receiving an eviction notice, and engaging in a physical altercation with a male inmate after an exchange of words.[34] Viewed in the light most favorable to plaintiff, this past misconduct put defendants on notice of Johnson's irresponsible and aggressive tendencies, which, at most, demonstrates that defendants were aware that Johnson had a propensity to disobey work-related protocol and engage in aggressive behavior when provoked. Defendants had no actual or constructive knowledge of prior similar criminal sexual misconduct. Even the incident of aggression did not put defendants on reasonable notice that Johnson would sexually assault an inmate; violent actions do not inevitably lead to acts of criminal sexual conduct.[35] Because Johnson's prior misconduct was not similar to the violent sexual assault he perpetrated against plaintiff, we hold that defendants may not be held vicariously liable for quid pro quo sexual harassment based on Johnson's unforeseeable criminal act under traditional principles of respondeat superior.[36]

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[34] The dissenting justices misrepresent the seriousness of Johnson's past conduct, stating that he "had a specific history of violent and abusive behavior toward inmates." *Post* at 56. In fact, Johnson had engaged in a single physical altercation with a male inmate in 1988, 13 years before the sexual assault in this case. Unlike the circumstances here, Johnson did not initiate the altercation with the male inmate.

[35] Cf. *Brown*, 478 Mich at 555.

[36] The dissenting justices dismiss our foreseeability analysis, concluding that Johnson's past violent act and sexual assault of plaintiff more

C. *CHAMPION v NATION WIDE SECURITY, INC*, AND ITS PROGENY

Plaintiff urges us to ignore these traditional common-law principles and extend the reasoning of this Court's decision in *Champion*, which referred to the Second Restatement of Agency's "aided-by-agency" exception to the rule of respondeat superior.[37] We reject this argument because, for reasons we will explain, *Champion* wrongly applied this respondeat superior exception to the CRA.

In *Champion*, this Court addressed, as a matter of first impression, whether an employer could be held vicariously liable for quid pro quo sexual harassment under the CRA. In that case, the plaintiff worked as a security guard, and her immediate supervisor scheduled her work, trained her, oversaw her performance, and was responsible for disciplining her. During a

than a decade later is sufficient to create a question of fact concerning defendants' vicarious liability. According to the dissenting justices, defendants had notice that Johnson would sexually assault a female inmate because Johnson, 13 years earlier, had engaged in a physical altercation initiated by a male inmate. In their view, *any* past violent conduct may create a jury-submissible question regarding foreseeability. Moreover, their contention that the question of foreseeability should have been submitted to the jury because this matter is substantially similar to *Hersh* is unavailing. In that case, the defendant's employee had a criminal conviction for *similar* prior conduct 10 years earlier, which the employer knew about, thus establishing a factual question regarding whether the employee had "vicious propensities." *Hersh*, 385 Mich at 413, 415. As we have indicated, evidence of *dissimilar* violent conduct is not reasonably predictive of violent sexual conduct. Nor can it be said that a reasonable employer could genuinely have foreseen Johnson's sexual assault of plaintiff on the basis of a single instance of entirely dissimilar violent conduct that arose as a result of provocation by a male inmate 13 years earlier. The dissenting justices fail to recognize that the temporal distance and the dissimilarity between past conduct and the conduct at issue make it unreasonable to conclude that an employer could have foreseen that Johnson would engage in quid pro quo sexual harassment or commit a criminal sexual assault.

[37] *Champion*, 450 Mich at 712 n 6.

weekend shift, the supervisor, who had been making sexually suggestive comments to the plaintiff, led her to a remote area of the building, locked her in a room, and demanded sex. When the plaintiff refused, the supervisor forcibly raped her. The plaintiff sued her employer for quid pro quo sexual harassment under the CRA. The defendant argued that the supervisor was not acting as its agent when he raped the plaintiff because it had not authorized the rape.[38]

The *Champion* Court rejected the defendant's argument, reasoning that "under defendant's construction, an employer could avoid liability simply by showing that it did not authorize the sexually offensive conduct."[39] The Court indicated that the defendant's "construction of agency principles [was] far too narrow" and briefly cited in support the aided-by-agency exception articulated in § 219(2)(d) of the Second Restatement of Agency.[40] The Court further stated that

> [the defendant's view] fails to recognize that when an employer gives its supervisors certain authority over other employees, it must also accept responsibility to remedy the harm caused by the supervisors' unlawful exercise of that authority. From his scheduling decisions that allowed him

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[38] *Id*. at 705-707.

[39] *Id*. at 713.

[40] *Id*. at 712 n 6. 1 Restatement Agency, 2d, § 219(2), p 481, provides that

> [a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless:
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> * * *
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> (d) the servant purported to act or to speak on behalf of the principal and there was reliance upon apparent authority, or he was aided in accomplishing the tort by the existence of the agency relation.

> to work alone with [the plaintiff] to his ordering of her into a remote part of the building, [the supervisor] used his supervisory power to put [the plaintiff] in the vulnerable position that led to her rape. In fact, there is little doubt that [the supervisor] would have been unable to rape [the plaintiff] but for his exercise of supervisory authority.[41]

Citing multiple federal cases, the *Champion* Court held that "an employer [is] strictly liable where the supervisor accomplishes the rape through the exercise of his supervisory power over the victim."[42] The Court justified its holding on the basis that "employers rarely, if ever, authorize such conduct, [and consequently] employees would no longer have a remedy for quid pro quo sexual harassment."[43]

Four years later, this Court again considered a quid pro quo sexual harassment claim in *Chambers v Trettco, Inc*.[44] There, a supervisor subjected the plaintiff to sexually offensive conduct. After enduring this conduct for four days, the plaintiff reported the incidents to another supervisor and ultimately sued her employer for hostile-environment and quid pro quo sexual harassment. A jury returned a verdict in the plaintiff's favor, and the Court of Appeals affirmed. The Court of Appeals in *Chambers* referred to federal caselaw that applied the federal Civil Rights Act[45] to hold that employers are vicariously liable when a supervisor victimizes a subordinate by creating a hostile work environment.

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[41] *Champion*, 450 Mich at 712 (citation omitted).

[42] *Id.* at 713-714. Since our decision in *Champion*, the drafters of the Third Restatement of Agency have excluded the aided-by-agency exception included in the Second Restatement of Agency.

[43] *Id*. at 713.

[44] *Chambers*, 463 Mich 297.

[45] 42 USC 2000e *et seq*.

This Court granted leave to consider whether principles derived from federal caselaw should apply to claims brought under Michigan's CRA. We held that courts considering claims under Michigan's CRA must adhere to Michigan precedent and the language of the CRA.[46] We clarified the law regarding sexual harassment in employment under the Michigan CRA and recognized that the "statute expressly addresses an employer's vicarious liability for sexual harassment committed by its employees by defining 'employer' to include both the employer *and* the employer's agents."[47] Using this definition, we determined that the Michigan CRA specifically incorporates common-law principles of respondeat superior and that "whether analyzing quid pro quo harassment or hostile environment harassment, the question is always whether it can be fairly said that the employer committed the violation—either directly or through an agent."[48]

After our decisions in *Champion* and *Chambers*, this Court considered the doctrine of respondeat superior generally in *Zsigo v Hurley Med Ctr*.[49] Although *Zsigo* did not involve a civil rights claim, the plaintiff sought to hold the defendant-employer vicariously liable for various intentional tort claims using the reasoning in *Champion* and the aided-by-agency exception to the doctrine of respondeat superior. The underlying facts involved a sexual assault perpetrated by the defen-

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[46] *Chambers*, 463 Mich at 316.

[47] *Id.* at 310.

[48] *Id*. at 312.

[49] *Zsigo*, 475 Mich 215. This Court did consider a single intervening civil rights case concerning quid pro quo sexual harassment, but the resolution of that case did not require application of the doctrine of respondeat superior because the plaintiff failed to establish that sexual harassment had occurred. See *Corley v Detroit Bd of Ed*, 470 Mich 274; 681 NW2d 342 (2004).

dant's employee against the plaintiff, who had been admitted as a patient in the defendant hospital. The plaintiff reported the incident and subsequently sued the hospital on the basis of the employee's actions.

We rejected the plaintiff's theory of vicarious liability and any notion that Michigan common law recognized the aided-by-agency exception or that this Court had adopted it in *Champion*.[50] With regard to *Champion*'s reference to the aided-by-agency exception, we explained that *Champion* did not adopt the aided-by-agency exception, but referred to it "only in passing and on the basis of the very distinct facts of that civil rights matter."[51] We further explained that *Champion* applied only in the context of quid pro quo sexual harassment under MCL 37.2103(i) and, in such instances, "the sexual assault must be 'accomplished through the use of the supervisor's managerial powers.' "[52] We ultimately rejected the plaintiff's theory of liability because it would have subjected employers to strict liability for unforeseen acts occurring outside the scope of an employee's employment.[53] Accordingly, the *Zsigo* Court declined to adopt the aided-by-agency exception and limited its applicability to the specific facts of the civil rights claim in *Champion*.

D. *CHAMPION* WAS WRONGLY DECIDED

Because *Zsigo* involved intentional tort claims, it did not provide an opportunity to address the validity of *Champion* in the civil rights context.[54] *Zsigo* required us

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[50] *Zsigo*, 475 Mich at 221-224.

[51] *Id.* at 223-224.

[52] *Id*. at 224 n 19, quoting *Champion*, 450 Mich at 704.

[53] *Zsigo*, 475 Mich at 227.

[54] Although Justice YOUNG recognized that the exception to respondeat superior that *Champion* created was "hard to square . . . with any conventional notion of agency, and . . . stands as an isolated, inexplicable

to consider whether Michigan common law recognized the aided-by-agency exception, given the intentional tort claims at issue. The present matter now places *Champion*'s continued validity squarely before us, and we conclude that *Champion* cannot be reconciled with *Chambers*, *Zsigo*, or the CRA itself.

First, we note that *Champion*'s holding was contrary to the plain language of the CRA. As we explained in *Chambers*, the CRA specifically incorporates common-law agency principles in its definition of "employer."[55] Michigan's common-law agency principles, however, do not include the aided-by-agency exception,[56] and the Legislature did not modify the common law by including the aided-by-agency exception in the CRA.[57] The *Champion* Court failed to recognize this clear intent. Rather, like the dissenting justices here, the *Champion* Court reasoned that the remedial purpose of the civil rights law justified holding the defendant employer vicariously liable for the acts of its employee, based on an apprehension that adherence to traditional agency principles would completely foreclose employer liability for quid pro quo sexual harassment claims.[58]

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exception" to this Court's agency jurisprudence, the Court was constrained to merely limit the application of *Champion* given that no civil rights claim was at issue in *Zsigo*. *Id*. at 232 (YOUNG, J., concurring).

[55] See *Chambers*, 463 Mich at 310-311.

[56] See *Zsigo*, 475 Mich at 223-224.

[57] The common law remains in force until it is affirmatively modified. Const 1963, art 3, § 7. The Legislature is presumed to know the common law, and any abrogation of the common law must be explicit. *Dawe v Dr Reuven Bar-Levav & Assoc, PC*, 485 Mich 20, 28; 780 NW2d 272 (2010).

[58] *Champion*, 450 Mich at 713. While the dissenting justices are correct that the purpose of a statute may be a relevant consideration, *post* at 38 n 3, what they fail to recognize is that this is correct *only* in so far as the purpose of the statute is derived from the actual language of the statute. See *Mich Ed Ass'n v Secretary of State (On Rehearing)*, 489 Mich 194, 202-203; 801 NW2d 35 (2011) ("The clear purpose of [the statute], *as*

Aside from failing to give effect to the Legislature's intent, this reasoning is flawed for two additional reasons. First, it wrongly elevates the CRA's general remedial purpose above its plain language. Such reasoning is contrary to the cornerstone of statutory interpretation, which is the rule that the plain language used is the best indicator of the Legislature's intent.[59] Second, the policy concern at the heart of *Champion* is fundamentally flawed because it was premised on an unfounded fear. Application of traditional agency principles does *not* foreclose employers from vicarious liability in the context of quid pro quo sexual harassment claims. An employer may still be liable for and act of quid pro quo sexual harassment that was committed within the scope of employment or for a foreseeable act that was committed outside the scope of employment.[60] Thus, liability may certainly attach if there is sufficient cause to impute the employee's or agent's acts to the employer because the employer knew of the employee's propensity to commit the type of act involved.

The *Champion* Court compounded its erroneous holding by relying on federal caselaw.[61] Unlike the federal civil rights act, the Michigan CRA specifically

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reflected in its language, is to mandate the separation of the government from politics in order to maintain governmental neutrality in elections, preserve fair democratic processes, and prevent taxpayer funds from being used to subsidize partisan political activities.") (emphasis added).

[59] See *Danse Corp*, 466 Mich at 181-182.

[60] Application of traditional respondeat superior principles also does not foreclose other avenues of legal recourse, including pursuit of direct criminal and civil liability against the perpetrator.

[61] See *Champion*, 450 Mich at 712 n 8, citing *Karibian v Columbia Univ*, 14 F3d 773 (CA 2, 1994), *Kauffman v Allied Signal, Inc*, 970 F2d 178 (CA 6, 1992), *Horn v Duke Homes*, 755 F2d 599 (CA 7, 1985), *Craig v Y & Y Snacks, Inc*, 721 F2d 77 (CA 3, 1983), *Katz v Dole*, 709 F2d 251 (CA 4, 1983), *Henson v City of Dundee*, 682 F2d 897 (CA 11, 1982), and *Miller v Bank of America*, 600 F2d 211 (CA 9, 1979).

incorporates Michigan common-law agency principles. Hence, unlike federal courts applying the federal civil rights act, Michigan courts applying the Michigan CRA are bound by this state's common-law agency principles. Because federal courts are not so bound, their reasoning in this context is often inapposite given that the language of the CRA must guide our decisions. For this reason, the Michigan Legislature's choice to incorporate agency principles into the CRA forecloses reliance on federal cases when determining whether a defendant will be vicariously liable under the CRA.[62]

Finally, we note that *Champion* is contrary to both prior and subsequent caselaw. Before *Champion*, this Court had never held that an employer could be vicariously liable for the unforeseeable criminal acts of its employees. Subsequent caselaw attempted to limit *Champion*'s applicability, but that caselaw merely demonstrated *Champion*'s dubious validity. *Chambers* recognized that the CRA incorporates common-law agency principles, and *Zsigo* made it clear that the aided-by-agency exception is not a part of this state's common law. Thus, contrary to the mandates of *Chambers* and *Zsigo*, *Champion* requires the application of an exception to respondeat superior in the context of quid pro quo sexual harassment claims that is not a part of this state's common law.[63] Because *Champion* requires a result contrary to prior and subsequent caselaw and

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[62] *Chambers*, 463 Mich at 315-316.

[63] Significantly, the drafters of the Third Restatement of Agency chose to exclude the aided-by-agency exception, thereby implicitly recognizing that the exception is not consistent with generally accepted common-law agency principles. While the dissenting justices dismiss this authority as unpersuasive, they ignore the fact that the aided-by-agency exception is not a "widely accepted exception to the general rules of agency." *Post* at 43-44. Only a few jurisdictions have adopted the exception wholesale into their common law, such that it applies to a typical tort claim. And, as we

contrary to the language of the CRA, it is clear that *Champion* is not consistent with Michigan law. Rather, when considered in the context of our jurisprudence, *Champion* stands as an isolated aberration that relies not on the plain language of the act, but purely on policy considerations.

E. STARE DECISIS

Our inquiry does not end simply because we have concluded that *Champion* was wrongly decided. Rather, we must determine whether overruling *Champion* is the most appropriate course of action. This is a decision that we do not undertake lightly and will make "only . . . after careful consideration of the effect of stare decisis."[64] However, we are also mindful that we are under no obligation to let stand an erroneous decision in the interest of stability and continuity.[65] We consider a multifactored test when determining whether to overrule precedent. The first question is whether the decision at issue was wrongly decided.[66] Having already addressed this question, we must now consider whether *Champion* "defies 'practical workability' " and "whether reliance interests would work an undue hardship . . . ."[67] These factors weigh in favor of overruling *Champion*.

First, despite our attempt in *Zsigo* to limit *Champion* to claims involving quid pro quo sexual harassment

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have explained, Michigan explicitly rejected the exception in *Zsigo* because it is inconsistent with fundamental principles of Michigan common law.

[64] *Haynie v Dep't of State Police*, 468 Mich 302, 314; 664 NW2d 129 (2003).

[65] *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000).

[66] *Id.*

[67] *Id*.

affecting employment, the present matter demonstrates that it is not possible to limit *Champion* in this respect. No meaningful distinction can be drawn between the facts in *Champion* and those in the present matter. Both Johnson and the supervisor in *Champion* were able to commit the rapes through their positions of authority over their victims. In both cases, the employers' agents had discretionary control over their victims by virtue of their positions: the supervisor in *Champion* was able to dictate the victim's schedule and order her to certain parts of the building, and Johnson had the authority to constrain plaintiff's freedom and to move her to certain parts of the jail. Certainly factual distinctions exist between *Champion* and the present case. Johnson was not plaintiff's supervisor in an employment context, and he could not have made plaintiff come to the building where he worked, unlike the supervisor in *Champion*. Yet these dissimilarities do not detract from the fact that Johnson would not have been able to commit the sexual assault but for his position of authority over plaintiff, much like the supervisor in *Champion*.

Indeed, *Champion*'s distortive impact, which is manifested when a plaintiff attempts to circumvent traditional rules of respondeat superior or otherwise attempts to avoid governmental immunity by framing a claim under the CRA, is apparent in lower court decisions of this state and further demonstrates *Champion*'s unworkability.[68] This is because there is no way to

[68] The Court of Appeals decision in this case is one example, see *Hamed*, 284 Mich App 681, as is the plaintiff's attempt in *Zsigo* to hold the employer vicariously liable for its employee's unforeseeable criminal act. See also *Diamond v Witherspoon*, 265 Mich App 673, 690-691; 696 NW2d 770 (2005) (presuming strict vicarious liability and rejecting governmental immunity in the context of a quid pro quo sexual harassment case under the CRA when a police officer subjected detained

effectively limit the rule announced in *Champion*, despite our prior attempt to do so. The reasoning on which *Champion* justified its holding is applicable not only to every quid pro quo sexual harassment case in which a plaintiff pursues a theory of vicarious liability—regardless of whether the discriminatory conduct affected employment, public services, or accommodations—but also to intentional tort claims in which a plaintiff seeks to hold an employer vicariously liable. Under *Champion*, it will always be "foreseeable" that employees who possess some authority by virtue of the employment relationship will abuse the power with which they have been vested when they commit, as here, a criminal act against another in the workplace.

Second, with regard to reliance interests, we cannot conclude that *Champion* "has become so embedded, so accepted, so fundamental, to everyone's expectations" that overruling it would upset any real-world reliance interests.[69] For there to be reliance, knowledge of a decision "must be of the sort that causes a person or entity to attempt to conform his conduct to a certain norm before the triggering event."[70] There is no indication that plaintiff or defendants relied on *Champion* by conforming their conduct before the underlying event—and, given the nature of the rule in *Champion*, it is unclear what form such reliance could have taken. It would be illogical to conclude that defendants condoned the sexual assault because of *Champion*, given that *Champion* would have imposed vicarious liability for the unforeseeable criminal acts of defendants' agent. Nor

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individuals to sexual conduct), and *Salinas v Genesys Health Sys*, 263 Mich App 315; 688 NW2d 112 (2004) (rejecting the plaintiff's attempt to hold the employer vicariously liable in tort under *Champion* for an unforeseeable criminal act).

[69] *Robinson*, 462 Mich at 466.

[70] *Id*. at 467.

would it be reasonable to suggest that plaintiff altered her conduct in reliance on *Champion*. We simply fail to see any possible way defendants and plaintiff could assert reliance on *Champion*.

Further, when the decision at issue involves statutory law, the best indicator of society's knowledge of the law, and what society reasonably relies on, is the language of the statute itself.[71] As we have explained, nothing in the language of the CRA eviscerates common-law rules of respondeat superior or otherwise engrafts the aided-by-agency exception into the statute. Accordingly, a decision to overrule *Champion* would not create any real-world dislocations.

Finally, further justification for overruling *Champion* can be found in the adverse practical consequences that would result from extending the case to the present matter. As we explained in *Zsigo*, "it is difficult to conceive of an instance when the [aided-by-agency] exception would not apply because an employee, by virtue of his or her employment relationship with the employer[,] is always 'aided in accomplishing' the tort."[72] Such an all-encompassing exception would apply equally to public-service cases.[73] Consequently, adoption of the aided-by-agency exception would effec-

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[71] See *id*. (stating that "it is well to recall in discussing reliance, when dealing with an area of the law that is statutory . . . , that it is to the words of the statute itself that a citizen first looks for guidance in directing his actions").

[72] *Zsigo*, 475 Mich at 226.

[73] In *Zsigo*, this Court noted that to adopt a rule contrary to that of the traditional common law would mean that the rule "applies to a broad range of employees whose duties *grant them unique access to and authority over others, such as . . . correctional officers,*" which "could virtually 'eviscerate[] the general scope of employment rule.' " *Zsigo*, 475 Mich at 230, quoting *Doe v Forrest*, 2004 VT 37, ¶ 59; 176 Vt 476, 505; 853 A2d 48 (2004) (Skoglund, J., dissenting) (some quotation marks omitted; emphasis added; alteration in original).

tively abolish the doctrine of respondeat superior in quid pro quo civil rights cases affecting public services and would result in the imposition of strict liability on governmental entities. In short, the exception would swallow the rule. Contrary to the current requirements for imposing vicarious liability, if the exception were adopted, a plaintiff would merely have to allege quid pro quo harassment and show that he or she was the victim of an intentional act by an employee in a particular custodial environment. Providers of public services would be liable for the unforeseeable criminal acts of their employees as long as claimants could couch their claims under the CRA, and the dangers of such a broad basis for seemingly unlimited strict liability, discussed earlier in this opinion, would become realities. Such a standard would apply to a wide range of public-service providers whose employees interact regularly with recipients of public services, including teachers, correctional and probation officers, physicians, nurses, and firefighters, to name a few.[74] Because public entities cannot increase prices or otherwise alter business practices to absorb the increased risk of liability, a governmental agency's only option may be to cut funding or curtail beneficial public programs. In justifying our decision to overrule *Champion* on this basis, we do not

[74] Artful pleading would also allow a plaintiff to avoid governmental immunity under the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. A school district, for example, could not be vicariously liable in tort for a teacher's sexual molestation of a student because the GTLA would bar the claim. However, if the plaintiff styled its claim as a CRA action, the school district could be vicariously liable under a theory of quid pro quo sexual harassment affecting public services. Plaintiff's preferred approach, under which public-service providers would be strictly liable for *precisely the same conduct* as that for which they would typically be immune, is inherently inconsistent with the Legislature's intent. If the Legislature had intended such a result, it should have clearly abrogated the common-law rule for purposes of the CRA.

downplay the heinous nature of the crime that plaintiff suffered. However, permitting liability against defendants under these circumstances would impose too great a burden on public-service providers and on society in general, which is clearly contrary to the Legislature's intent.[75]

We therefore conclude that *Champion* was wrongly decided and that overruling it would not interfere with legitimate reliance interests. We overrule *Champion* because it is inconsistent with longstanding Michigan law that employers, including public-service providers, are not vicariously liable for quid pro quo sexual harassment on the basis of the unforeseeable criminal acts of their employees.[76]

F. RESPONSE TO THE DISSENTS

We disagree with the dissenting justices regarding whether *Champion* was correctly decided and should be overruled. Although the dissenting justices concede that *Champion* was unprecedented, they adhere to *Champion*'s reasoning to conclude that the exception to common-law agency principles is necessary to give effect to the broad purpose of the CRA and the Legislature's intent in enacting it. Yet the dissenting justices' conclusion that *Champion* was correctly decided for this reason ignores the fundamental flaws inherent in *Champion*. Notably, the dissenting opinions, like *Champion*, do not cite any language from the CRA to support

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[75] See *Brown*, 478 Mich at 557-558, and the discussion at page 15 of this opinion.

[76] Because we have decided that defendants cannot be held vicariously liable for Johnson's criminal act under the CRA, we need not address defendants' alternative arguments that the Wayne County jail is not a "public service" within the meaning of the CRA or that the circuit court improperly permitted plaintiff to amend the complaint.

this view, even though a statute's language is the best indicator of the Legislature's intent. Instead, the dissenting justices rely on caselaw describing the CRA as "remedial," just as *Champion* did, for the proposition that "the exception to common-law agency principles established in *Champion* [is] necessary to give effect to the broad purpose of the CRA . . . ."[77] Apparently, this "necessity" is based on the dissenting justices' concern, as was the concern in *Champion*, that without the exception, discriminatory conduct would not be eradicated and the purpose of the CRA would be defeated.[78] This fear vastly overstates the effect of our decision because, as we have explained, employers and public-service providers will still be vicariously liable for sexual harassment under traditional and longstanding principles of respondeat superior. In short, the dissenting justices' reliance on *Champion* itself for the proposition that *Champion* was correctly decided lacks merit for reasons we have already explained.[79]

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[77] *Post* at 38 (CAVANAGH, J., dissenting). Likewise, the author of the other dissent cites no specific language and provides no analysis in support of her accusation that our decision is somehow "contrary to the rule of law" or "results in the dismantling of the [CRA]." *Post* at 60 (HATHAWAY, J., dissenting). Rather, as we have explained at great length, our decision honors both our common-law tradition and the language of the CRA and is consistent with that statute's purpose.

[78] The dissenting justices' concern in this regard is related to their failure to recognize plaintiff's claim for what it really is: an attempt to hold a governmental entity liable for an employee's criminal action and unforeseeable intentional tort.

[79] Indeed, the dissenting justices concede that the "bulk of [their] analysis" relies only on *Champion*, *post* at 42 n 7, which we have explained at length is a decision not supported in Michigan's law generally, and thereby effectively admit that no other binding Michigan law supports their conclusion other than *Champion*. Simply because *Champion* was a unanimous decision decided 15 years ago does not mean it was correctly decided or that its reasoning is correct today. Not only do the dissenting justices ignore the plain language of the CRA, they also

The dissenting justices compound their erroneous reasoning by wrongly interpreting subsequent opinions of this Court as confirming that *Champion* was correctly decided and as explicitly confirming that *Champion* adopted an exception "very similar to the aided-by-agency exception."[80] Contrary to the dissenting justices' view, *Zsigo* did *not* expressly confirm *Champion* in this regard, and *Chambers* did *not* expressly hold that *Champion* is a valid part of Michigan's common law, both of which the dissenting justices suggest.[81] Further, although the dissenting justices acknowledge that the CRA incorporates common-law agency principles, they then ignore the explicit and unambiguous holding in *Zsigo*, namely that this Court has never recognized the aided-by-agency exception, or a similar rule, as part of this state's common law. Despite *Zsigo*'s unambiguous holding, the dissenting justices continue to declare that *Champion* should be applied in sexual discrimination cases because the exception can be "narrowly tailored."[82] The *Zsigo* majority rejected any notion that the exception had such

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ignore subsequent changes in the law that have exposed the flaws in *Champion*'s reasoning. See pages 24-25 and note 63 of this opinion.

[80] *Post* at 41.

[81] In fact, contrary to the dissenting justices' position, *Zsigo* did undermine the primary rationale of *Champion*. The *Zsigo* Court did not entirely "dispatch the exception created in *Champion*," *post* at 41 n 6, because *Zsigo* was not a civil rights case.

[82] *Post* at 42. The dissenting justices' position that *Champion* was correctly decided on this basis relies primarily on the dissenting opinion in *Zsigo*, which is not binding precedent. The dissenting justices in this case disregard this criticism, asserting that the dissenting opinion in *Zsigo* is an "example" of *Champion*'s workability. *Post* at 42 n 7. Yet, the rationale of the dissent in *Zsigo* lacks any persuasive value because, like the main dissent here, the *Zsigo* dissent repeatedly advocated adopting the aided-by-agency exception and the Vermont Supreme Court's decision in *Doe*. This Court has already explicitly rejected both as inconsistent with Michigan law.

boundaries, which demonstrates that *Zsigo* does not support *Champion* in this regard. Thus, it is the dissenting justices who seek to aggressively expand the law of this state, while our holding merely reaffirms and applies traditional common-law rules that have always governed in Michigan.

Not surprisingly, using the faulty premise that *Champion*'s reasoning is correct, the dissenting justices advocate a straightforward application of *Champion*. This approach ignores an irreconcilable tension in our law. Although *Champion* and this case are similarly framed civil rights cases involving allegations of quid pro quo sexual harassment, the conflicting dispositions in the courts below demonstrate the tension between the multiple precedents of this Court at issue in this case. The circuit court below relied on *Zsigo* to grant summary disposition to defendants, recognizing that *Zsigo* established "a very clear bright line rule" that an employer is not liable when an employee unforeseeably acts outside the scope of his or her employment, as was the case here. The Court of Appeals reversed, relying instead on *Champion*, which had never been applied outside the employment context, for the proposition that a public-service provider may be vicariously liable when its employee uses his or her "authority over a subordinate as a means of subjecting that subordinate to abusive and unlawful conduct." Thus, in this case, we are presented with conflicting principles: those of the traditional common-law rule that have guided Michigan law for more than a century as articulated in *Zsigo* and those underlying the rule of *Champion*, which inexplicably departed from the requirements that have always been held as necessary to impose respondeat superior liability. The existence of these conflicting precedents and principles cries out for clarity and compels our decision to overrule *Champion*.

Further, we disagree with the main dissent's view that principles of stare decisis do not support overruling *Champion*. The main dissent applies a stare decisis test set forth in *Petersen v Magna Corp*[83] that is not the law of this state. Because a majority of this Court did not adopt that test, and a majority of justices have agreed to the rule articulated in *Robinson v Detroit*,[84] the test in *Robinson* governs this analysis. Nevertheless, overruling *Champion* is the right result, regardless of which test is applied.

The most basic error in the main dissent's stare decisis analysis is its misunderstanding of why *Champion* is unworkable. The dissent posits that the aided-by-agency exception is "narrowly tailored" because it applies only when an agency relationship aided a supervisor in committing a wrongful act.[85] According to the dissent, the exception does not apply when an agency relationship merely provided a supervisor an opportunity to accomplish a wrong. This interpretation is nothing more than a semantic exercise that demonstrates the capricious nature of *Champion*: An employment relationship will always provide a supervisory employee an opportunity to commit a wrong, but when does that opportunity become an "aid"? Similarly, in the public-services context, a citizen's interaction with an employee administering public services will always arise during the administration of those services while the employee is exercising his or her authority; when are public-service employees "aided" and when are they not "aided" while exercising their authority? There is no meaningful demarcation.[86] Continued

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[83] *Petersen v Magna Corp*, 484 Mich 300, 313-320; 773 NW2d 564 (2009) (opinion by MARILYN KELLY, C.J.).

[84] *Robinson*, 462 Mich 439.

[85] *Post* at 42-43 (CAVANAGH, J., dissenting).

[86] The main dissent counters that application of the Vermont Supreme Court's three-pronged test would amount to "a narrowly tailored ap-

adherence to *Champion* would require jurors and judges to determine vicarious liability according to their subjective whims. For this same reason, the dissent's view that *Champion* provides "important guidance to trial courts" is simply wrong.[87]

Finally, we find unpersuasive the main dissent's reliance on decisions from other jurisdictions that have applied the aided-by-agency exception in the context of their civil rights laws. If liability is to be imposed under Michigan law on an employer for sexual harassment committed by its employee, that liability must be mandated by the Michigan CRA.[88] The aided-by-agency exception in the context of civil rights cases is not so well accepted and "nearly unanimous" as the main dissent appears to claim.[89] Most states have *not* recognized the aided-by-agency exception in civil rights cases and, at least with respect to the jurisprudence of this Court, application of the aided-by-agency exception remains an aberration.

IV. CONCLUSION

Michigan law has never imposed liability on an employer for the unforeseeable criminal actions of its

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proach to applying the aided-by-agency exception . . . ." *Post* at 48. Yet this test suffers from the same deficiencies we have already described because it makes no valid distinction between a mere "opportunity" and an "aid."

[87] *Post* at 48-49. The main dissent also misconstrues our citation of *Diamond* and *Salinas*. Those cases do not demonstrate *Champion*'s workability. Rather, they are examples of "artful pleading" in which the plaintiffs sought to circumvent traditional rules of respondeat superior by framing their claims under the CRA. See note 74 of this opinion.

[88] Notably, the main dissent ignores the mandate of *Chambers* to consider the language of the Michigan CRA of paramount importance when interpreting the Michigan CRA as opposed to any guidance that federal caselaw may provide. *Chambers*, 463 Mich at 313-314.

[89] *Post* at 49 (quotation marks and citation omitted).

employees, except in *Champion*. Nor has Michigan common law incorporated an exception based on an aided-by-agency theory of liability. Accordingly, we conclude that a provider of a public service may not be held vicariously liable for quid pro quo sexual harassment affecting public services on the basis of unforeseeable criminal acts that its employee committed outside the scope of employment. Because *Champion* is inconsistent with our holding and with Michigan's common and statutory law, we overrule *Champion*. We reverse the Court of Appeals' judgment and reinstate the circuit court's order granting summary disposition in favor of defendants.

YOUNG, C.J., and MARKMAN and ZAHRA, JJ., concurred with MARY BETH KELLY, J.

CAVANAGH, J. (*dissenting*). I dissent from the majority's decision to overrule *Champion v Nation Wide Security, Inc*, 450 Mich 702; 545 NW2d 596 (1996), a unanimous decision of this Court.[1] As the majority flatly admits, there are no significant factual differences between this case and *Champion*. Accordingly, because *Champion* was correctly decided and reflects the purpose and legislative intent of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, I would apply *Champion* to this case and affirm the judgment of the Court of Appeals.

I. SUMMARY OF *CHAMPION*

In *Champion*, the plaintiff's supervisor offered job security in exchange for sexual favors, and when the plaintiff refused, the supervisor used his authority to

[1] The concurring justices joined the analysis in full. See *Champion*, 450 Mich at 714 (BOYLE, J., concurring).

isolate the plaintiff in a remote portion of the building where they worked and raped her.[2] This Court explained that under MCL 37.2103(i), a party pursuing a quid pro quo harassment claim in an employment context must establish "(1) that she was subject to any of the types of unwelcome sexual conduct or communication described in the statute, and (2) that her employer or the employer's agent used her submission to or rejection of the proscribed conduct as a factor in a decision affecting her employment." *Champion*, 450 Mich at 708-709. Like defendants in this case, the defendant in *Champion* argued that the plaintiff could not satisfy the second prong of a quid pro quo sexual harassment claim because the attacker was acting outside the scope of his authority when he raped the plaintiff and, as a result, was not acting as the defendant's agent. This Court unanimously rejected that argument, stating that "when an employer gives its supervisors certain authority over other employees, it must also accept responsibility to remedy the harm caused by the supervisors' unlawful exercise of that authority." *Id*. at 712. We further noted that "an employer rarely authorizes an agent to break the law or otherwise behave improperly; yet, liability is frequently imputed to an employer for such conduct." *Id*. at 712 n 7.

In concluding that the plaintiff could pursue a quid pro quo sexual harassment claim against the defendant, *Champion* explained that a contrary result would "create an enormous loophole in the statute" that "would

[2] Although many opinions address this issue in the context of workplace supervisor-subordinate relationships, those opinions are applicable to this case because the analysis is largely rooted in the recognition that a supervisor wields substantial authority over a subordinate, just as a sheriff's deputy, acting under color of law, holds significant authority over a jail inmate.

defeat the remedial purpose underlying this state's civil rights statute and would lead to a construction that is inconsistent with the well-established rule that remedial statutes are to be liberally construed." *Id.* at 713, citing *Eide v Kelsey-Hayes Co*, 431 Mich 26, 34; 427 NW2d 488 (1988).

II. *CHAMPION* WAS CORRECTLY DECIDED

The majority claims that *Champion* "was contrary to the plain language of the CRA," *ante* at 22, and, thus, was wrongly decided. Although I generally agree with the majority that the CRA incorporated the common law of agency, the exception to common-law agency principles established in *Champion* was necessary to give effect to the broad purpose of the CRA and the Legislature's intent in enacting it. See *Henson v City of Dundee*, 682 F2d 897, 910 n 21 (CA 11, 1982) (recognizing that "[t]he common law rules of respondeat superior will not always be appropriate to suit the broad remedial purposes" of civil rights statutes).[3] Furthermore, this Court has previously considered the purpose of the CRA as a method of discerning the legislative intent behind the act. See *Victorson v Dep't of Treasury*, 439 Mich 131, 143-144; 482 NW2d 685 (1992). Indeed, even the majority recognizes that a statute's purpose is a relevant consideration in determining the legislative intent. See *ante* at 22 n 58.

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[3] This Court has recognized that the purpose of a statute is a relevant consideration when applying the statute in a broad array of cases. See, e.g., *Adair v Michigan*, 486 Mich 468, 477; 785 NW2d 119 (2010) (stating that "the primary and fundamental rule of constitutional or statutory construction is that the Court's duty is to ascertain the *purpose and intent* as expressed in the constitutional or legislative provision in question") (emphasis added). Indeed, the members of the majority in this case recently found the purpose of the Michigan Campaign Finance Act worthy of lengthy consideration in *Mich Ed Ass'n v Secretary of State* (*On Rehearing*), 489 Mich 194; 801 NW2d 35 (2011).

The CRA recognizes that "freedom from discrimination because of sex is a civil right." *Chambers v Trettco, Inc*, 463 Mich 297, 309; 614 NW2d 910 (2000). Thus, the CRA is intended to "remedy[] discrimination in employment, . . . public accommodations, services, and educational institutions." *Eide*, 431 Mich at 31; see, also, *Miller v C A Muer Corp*, 420 Mich 355, 363; 362 NW2d 650 (1984) ("The Michigan civil rights act is aimed at the prejudices and biases borne against persons because of their membership in a certain class . . . and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases.") (quotation marks and citations omitted).[4] Furthermore, as the majority acknowledges, the CRA is a remedial statute, and "remedial statutes are to be liberally construed . . . ." *Eide*, 431 Mich at 34.

In light of this understanding of the CRA's purpose and the Legislature's intent in enacting the CRA, I believe that *Champion* properly advanced the legislative intent by ensuring that clearly discriminatory conduct is eradicated. The majority's interpretation, however, bars plaintiff from pursuing a claim in furtherance of this goal and ignores "the legislative intent that employers, not the victims of sexual harassment, bear the costs of remedying and eradicating discrimination." *Champion*, 450 Mich at 714. The majority erroneously discards *Champion*'s interpretation of the leg-

[4] The majority's suggestion that the language of the CRA does not support this interpretation of the act's purpose is remarkable, given that this Court's opinions in *Eide*, *Miller*, and many other cases have similarly summarized the CRA's purpose. See, e.g., *Radtke v Everett*, 442 Mich 368, 379; 501 NW2d 155 (1993) (quoting the CRA and concluding that "[t]he Civil Rights Act is aimed at the prejudices and biases borne against persons because of their membership in a certain class, and seeks to eliminate the effects of offensive or demeaning stereotypes, prejudices, and biases") (quotation marks and citations omitted); see, also, MCL 37.2102, MCL 37.2202, and MCL 37.2302.

islative intent as based "purely on policy considerations," *ante* at 25, and ignores the fact that the policy considerations discussed in *Champion* were the motivation behind the Legislature's enactment of the CRA.[5] As a result, "in seeking to shield employers from liability, the majority instead places the burden of preventing an abuse of authority and the corresponding harm on people powerless to prevent it." *Zsigo v Hurley Med Ctr*, 475 Mich 215, 236; 716 NW2d 220 (2006) (MARILYN KELLY, J., dissenting).

Moreover, the majority's reliance on *Chambers* to support its conclusion that *Champion* was wrongly decided is misplaced. In fact, *Chambers* expressly acknowledged *Champion*'s holding as a valid part of Michigan's common law related to quid pro quo sexual harassment under the CRA. See *Chambers*, 463 Mich at

[5] Ironically, the majority in this case also relies on policy considerations, claiming that *Champion* creates an unfair "societal burden" and an unbearable financial burden on employers. *Ante* at 14-15, 28-29. It is odd that the majority opinion finds it appropriate to rely on these policy considerations while simultaneously rejecting *Champion* for its consideration of the policy concerns reflected in the CRA. Setting that contradiction aside, however, what is even more telling is the fact that *Champion*'s policy considerations were rooted in the legislative intent and purpose of the CRA. Indeed, the CRA's title expressly states that the CRA is intended to "prohibit discriminatory practices, policies, and customs . . . ." Title of 1976 PA 453. The majority opinion in this case does exactly the opposite in furtherance of policy considerations that do not appear in the CRA. Nowhere did the Legislature indicate that the "societal burden" or the financial burden on employers is a valid consideration when interpreting and applying the act. In fact, the CRA indicates that the Legislature intended that governmental employers bear the cost of eliminating sexual harassment, not avoid it, as shown by the specific inclusion of state and political subdivisions and their agents as employers covered by the act. MCL 37.2103(g) and (h) and MCL 37.2201(a); see, also, *Mack v Detroit*, 467 Mich 186, 195; 649 NW2d 47 (2002) (noting that there are areas in which "the Legislature has allowed specific actions against the government to stand, such as the Civil Rights Act").

311 ("Vicarious liability exists in the case of quid pro quo harassment because the quid pro quo harasser, by definition, uses the power of the employer to alter the terms and conditions of employment. *Champion*, *supra*.").

Similarly, the majority erroneously interprets *Zsigo* as supporting its conclusion that *Champion* misinterpreted the CRA. The *Zsigo* majority expressly recognized that the *Champion* Court, like many other courts, applied an exception to quid pro quo sexual harassment claims that is very similar to the aided-by-agency exception. *Zsigo*, 475 Mich at 227 n 28 (listing state and federal opinions adopting the aided-by-agency exception in sexual harassment cases). While I continue to adhere to the *Zsigo* dissent's conclusion that a narrowly tailored interpretation of the aided-by-agency exception should be applied outside the context of sexual harassment cases, that disagreement with *Zsigo* is of no moment in this case, given that the case before us is obviously a quid pro quo sexual harassment claim. Thus, under *Chambers* and even under the majority opinion in *Zsigo*, *Champion*'s exception applies to this case.[6]

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[6] Although the majority is correct that *Zsigo* held that the aided-by-agency exception is not a part of Michigan's *general* common law, the majority's efforts to counter this dissent's interpretation of *Chambers* and *Zsigo* are unavailing because both of those opinions recognized that *Champion*'s exception applied *in the context of quid pro quo sexual harassment cases*, as the majority acknowledges. See *ante* at 21; see, also, *Chambers*, 463 Mich at 311 (citing *Champion* for the premise that "[v]icarious liability exists in the case of quid pro quo harassment because the quid pro quo harasser, by definition, uses the power of the employer to alter the terms and conditions of employment"), and *Zsigo*, 475 Mich at 224 n 19 (recognizing that *Champion* applies "in the context of quid pro quo sexual harassment under MCL 37.2103(i)"). Indeed, the fact that the majority finds it necessary to expressly overrule *Champion* today further demonstrates that *Chambers* and *Zsigo* did not dispatch the exception created in *Champion*. The majority's refusal to accept the

Finally, contrary to the majority's concern that *Champion* created an exception that swallows the general agency rules, *Champion*'s exception "does not extend unlimited liability to employers whose supervisors rape subordinates." *Champion*, 450 Mich at 713. A mere supervisor-subordinate relationship is not enough. Rather, an employer is only liable when "the supervisor accomplishes the rape *through the exercise of his supervisory power over the victim*." *Id.* at 713-714 (emphasis added). As *Champion* explained, this approach is "fully consistent . . . with the legislative intent that employers, not the victims of sexual harassment, bear the costs of remedying and eradicating discrimination." *Id*. at 714.

Furthermore, as the dissent in *Zsigo* aptly explained, it is entirely possible to adopt a narrowly tailored interpretation of the aided-by-agency exception in order to avoid swallowing the general agency rules. *Zsigo*, 475 Mich at 239-243 (MARILYN KELLY, J. dissenting).[7] After

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fact that *Champion* has been part of Michigan's common law for the last 15 years does not make its view so. Rather, as this dissent thoroughly explains, *Champion* is a longstanding, unanimous precedent of this Court that is consistent with the purpose and legislative intent behind the CRA and with the approach taken by the United States Supreme Court and many other jurisdictions in similar civil rights cases. Accordingly, the majority is mistaken when it claims that I seek to "aggressively expand the law of this state" while it merely seeks to "reaffirm[] . . . common-law rules that have always governed in Michigan." *Ante* at 33. Rather, as demonstrated by its need to overrule a deep-rooted opinion of this Court, it is the majority that embarks on an ill-advised major change in the law.

[7] The majority erroneously implies that I only rely on nonbinding dissenting opinions of this Court to support my conclusion that *Champion* was correctly decided. Although I think that the *Zsigo* dissent provides an example of a narrow, workable interpretation of the aided-by-agency exception, the bulk of my analysis in support of my conclusion that *Champion* was correctly decided rests on the reasoning from *Champion*'s well-established and unanimous opinion, which was not overruled by either of the majority opinions in *Chambers* and *Zsigo*. Surprisingly, the majority disparages my analysis for relying on *Cham-*

reviewing various other jurisdictions' efforts to balance the scope of the aided-by-agency exception, the *Zsigo* dissent concluded that an opinion from the Vermont Supreme Court represented the most compelling approach. See *Doe v Forrest*, 2004 VT 37, ¶ 21; 176 Vt 476; 853 A2d 48 (2004), citing *Burlington Indus, Inc v Ellerth*, 524 US 742; 118 S Ct 2257; 141 L Ed 2d 633 (1998), and *Faragher v Boca Raton*, 524 US 775; 118 S Ct 2275; 141 L Ed 2d 662 (1998). *Doe* explained that under *Faragher*, in order to properly apply the aided-by-agency exception, a court should consider three factors: (1) "the opportunity for contact created by the relationship," (2) "the powerlessness of the employee to resist the perpetrator and prevent the unwanted contact," and (3) "the opportunity to prevent and guard against the conduct." *Doe*, 2004 VT 37 at ¶ 33; 176 Vt at 491. Thus, in response to the questions posed by the majority regarding when an employer will be held liable for an employee's conduct, see *ante* at 34, an employer would only be liable for quid pro quo sexual harassment arising out of an employee's conduct if the three factors were met, or, as *Champion* put it, when "the supervisor accomplishes the rape *through the exercise of his supervisory power over the victim*." *Champion*, 450 Mich at 713-714 (emphasis added). Accordingly, *Champion* can be applied without imposing the boundless liability that the majority fears.

In summary, *Champion* properly relied on the legislative intent and the purpose behind the CRA when it adopted a widely accepted exception to the general rules

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pion's reasoning, see *ante* at 31 n 79, but I am quite certain that relying on longstanding, unanimous precedent from this state's highest court is a well-accepted method of legal analysis. Furthermore, I disagree with the majority's claim that *Champion* is the only "binding Michigan law" supporting my conclusion. *Ante* at 31 n 79. Rather, I believe that the CRA itself also supports my analysis.

of agency. And given that the Legislature has not chosen to amend the applicable CRA provisions during the 15 years since *Champion* was decided, I think that it is fair to conclude that the Legislature believes that *Champion* accurately reflected the legislative intent behind the CRA, rather than representing a dangerous departure from it, as the majority claims. See, e.g., *Devillers v Auto Club Ins Ass'n*, 473 Mich 562, 613-614; 702 NW2d 539 (2005) (CAVANAGH, J., dissenting) (explaining the significance of the Legislature's decision not to modify a statute after this Court has interpreted it). Because it is " 'the nature of the common law that every appellate decision represents the development of the common law,' " *Zsigo*, 475 Mich at 241 n 11 (MARILYN KELLY, J., dissenting) (citation omitted), *Champion* has been a valid part of Michigan's common law for the last 15 years and should be applied in this case.

III. STARE DECISIS

In light of the preceding analysis, it is clear that *Champion* furthers the Legislature's intent when it enacted the CRA. As a result, *Champion* was correctly decided and no further stare decisis consideration is needed. However, even accepting the majority's faulty conclusion that *Champion* was wrongly decided, I do not agree that its decision to overrule *Champion* is supported by stare decisis principles.

The United States Supreme Court has explained that the doctrine of stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v Tennessee*, 501 US 808, 827; 111 S Ct 2597; 115 L Ed 2d 720 (1991). As a result, "a stare decisis analysis should always begin with the presump-

tion that upholding the precedent involved is the preferred course of action." *Petersen v Magna Corp*, 484 Mich 300, 317; 773 NW2d 564 (2009) (opinion by MARILYN KELLY, C.J.). Thus, "overturning precedent requires more than a mere belief that a case was wrongly decided," *McCormick v Carrier*, 487 Mich 180, 211; 795 NW2d 517 (2010), and the presumption in favor of upholding precedent "should be retained until effectively rebutted by the conclusion that a compelling justification exists to overturn the precedent," *Petersen*, 484 Mich at 317 (opinion by MARILYN KELLY, C.J.).[8]

Several of the criteria discussed in *Petersen* weigh particularly heavily in favor of upholding *Champion* rather than overruling it: (1) *Champion* provided a practical and workable rule, (2) *Champion* has not been robbed of significant application or justification because it remains a highly significant and relevant guidepost in the area of civil rights law, (3) other jurisdictions have adopted exceptions similar to the one in *Champion*, and (4) overruling *Champion* is likely to result in serious detriment prejudicial to public interests. See *Petersen*, 484 Mich at 320.[9]

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[8] In *Petersen*, then Chief Justice MARILYN KELLY provided a nonexhaustive list of criteria for consideration when a court engages in a stare decisis analysis, but no single criterion is determinative, and a given criterion need only be evaluated if relevant. *Petersen*, 484 Mich at 320. The majority's implication that my stare decisis analysis is invalid because I apply *Petersen* is misplaced, given that *Petersen*'s test simply expands on the test from *Robinson v Detroit*, 462 Mich 439, 464; 613 NW2d 307 (2000). Further *Petersen* is more respectful of precedent, and thus is more consistent with the principles of stare decisis. See *Petersen*, 484 Mich at 315-319 (opinion by MARILYN KELLY, C.J.).

[9] Although Chief Justice KELLY also recognized that reliance on the rule in question may be a valid consideration when engaging in a stare decisis analysis, the majority's extensive reliance on this factor to support its decision to overrule *Champion* is misplaced. In my view, this factor is of little importance in this case because no one plans on being sexually harassed or employing persons who commit sexual harassment. Thus,

Contrary to the majority's claims, *Champion* has not proved to be unworkable, and thus this criterion weighs in favor of upholding *Champion*. Again, although I disagree with the *Zsigo* majority's decision to limit *Champion* by applying it only to cases raising quid pro quo sexual harassment claims, that limitation is an example of an arguably workable bright-line rule regarding the scope of *Champion*'s exception. Therefore, the majority's claim that *Champion* is unworkable because it results in unlimited vicarious liability "despite our attempt in *Zsigo* to limit *Champion*," *ante* at 25, is inexplicable.[10]

Indeed, the Court of Appeals opinions the majority cites in support of this claim, *ante* at 26-27 n 68, are either irrelevant or demonstrate *Champion*'s workability rather than its unworkability.

In *Diamond v Witherspoon*, 265 Mich App 673; 696 NW2d 770 (2005), and its companion case, the Court of Appeals rejected a city's claims of governmental immunity and permitted the plaintiffs to bring quid pro quo sexual harassment claims under the CRA based on the same city police officer's sexual conduct during traffic stops. The

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there is little reason for anyone to "conform his conduct to a certain norm" in reliance on *Champion*. *Ante* at 27 (quotation marks and citation omitted). Rather, *Champion* provided a remedy for an unexpected and unwelcome event. Therefore, I find unpersuasive the majority's claim that *Champion* may be overruled because parties have not relied on its holding to their detriment.

[10] Moreover, the majority's claim that *Champion* allows plaintiffs to engage in "[a]rtful pleading," *ante* at 29 n 74, in order to "avoid governmental immunity by framing a claim under the CRA," *ante* at 26, is misplaced and, frankly, offensive. See, also, *ante* at 31 n 78. Plaintiff in this case, and presumably the plaintiffs in other sexual harassment cases, bring actions under the CRA because the sexual harassment infringed on their civil rights. By assuming that plaintiffs bring CRA claims to manipulate the judicial system, the majority throws salt in these plaintiffs' raw wounds.

Court of Appeals explained that governmental immunity is not a defense to actions under the CRA but did not directly address the vicarious liability issues arising out of that case. *Id.* at 691. As a result, *Diamond* is of little import in determining *Champion*'s workability.

The other opinion the majority cites in this regard, *Salinas v Genesys Health Sys*, 263 Mich App 315; 688 NW2d 112 (2004), actually demonstrates *Champion*'s workability and exhibits the "meaningful demarcation" that the majority so desperately seeks.[11] See *ante* at 34. In that case, the Court of Appeals applied the aided-by-agency exception and concluded that vicarious liability did not extend to the employer because the attacker's agency relationship with the defendant merely provided the attacker with the opportunity to commit the sexual assault. Thus, the agency relationship did not aid the attacker in committing the sexual assault. *Salinas*, 263 Mich App at 320-321. In my view, *Salinas* provided an example of how *Champion* did not create limitless liability, even in the context of quid pro quo sexual harassment claims.[12]

Finally, *Champion* itself explained that its holding "does not extend unlimited liability to employers . . . ."

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[11] Moreover, as discussed earlier in this dissent, the three-prong test established in *Doe*, 2004 VT 37, and favored by the *Zsigo* dissent further establishes a "meaningful demarcation" of an employer's liability for an employee's improper use of delegated supervisory authority.

[12] Contrary to the majority's claims, the distinction exemplified by *Salinas* is quite clear: if an employee is merely presented with an opportunity to commit sexual harassment by having the employer's permission to be in a certain location, the employer is not vicariously liable because the employee did not use any employer-delegated authority to aid in the creation of the opportunity to commit the sexual harassment. But if, as in *Champion* and the case at bar, the employee actively uses the powers delegated by the employer to direct the victim to a location or otherwise create circumstances that aid in the commission of sexual harassment, vicarious liability may attach.

Champion, 450 Mich at 713. Rather, an employer is only liable if its employee "accomplishes the rape through the exercise of his supervisory power over the victim." *Id.* at 713-714. Such a limitation is eminently workable, as the Court of Appeals opinion in *Salinas* demonstrated. Additionally, as discussed earlier in this opinion, Vermont's high court has provided a clear example of a narrowly tailored approach to applying the aided-by-agency exception that would limit the scope of an employer's liability. *Doe*, 2004 VT 37 at ¶ 33; 176 Vt at 491; see, also, *Zsigo*, 475 Mich at 239-243 (MARILYN KELLY, J., dissenting) (arguing in favor of adopting *Doe*'s three-factor test). In sum, *Champion* has remained workable from the time it was first published until its untimely demise at the hands of the majority today. Thus, this factor weighs in favor of upholding *Champion*.

Champion also remains a highly significant and relevant guidepost in the area of civil rights law, which weighs in favor of upholding it. *Champion* remains relevant because it properly recognized that failing to impose liability on an employer when its employees use supervisory powers delegated by the employer to commit quid pro quo sexual harassment is a "far too narrow" construction of agency principles. *Champion*, 450 Mich at 712. As *Champion* explains, "immunizing an employer where it did not authorize the offending conduct would create an enormous loophole in the statute." *Id.* at 713. Therefore, *Champion* correctly concluded that when an employer delegates authority to an employee, the employer must accept the responsibility of remedying the harm caused by misuse of that authority, which is consistent with the "legislative intent that employers, not the victims of sexual harassment, bear the costs of remedying and eradicating discrimination." *Id.* at 714. Thus, *Champion* provides

important guidance to trial courts and ensures that the legislative intent behind the CRA is implemented. Accordingly, *Champion* should be upheld.[13]

Further supporting the conclusion that stare decisis does not support overruling *Champion* is the fact that numerous other jurisdictions have adopted the aided-by-agency exception in the context of civil rights cases. See *Petersen*, 484 Mich at 320 (opinion by MARILYN KELLY, C.J.). To begin with, as *Champion* stated, application of the aided-by-agency exception is a "nearly unanimous view" in the context of quid pro quo sexual harassment committed by supervisory personnel. *Champion*, 450 Mich at 712.[14] The majority opinion,

[13] The majority also states that because "the drafters of the Third Restatement of Agency have excluded the aided-by-agency exception included in the Second Restatement of Agency," *ante* at 19 n 42, *Champion* no longer reflects the preferred approach and I "ignore" this "change[] in the law," *ante* at 31-32 n 79. To begin with, as the comments to the Third Restatement of Agency explain, the Third Restatement now addresses "[t]he purposes likely intended to be met by the 'aided in accomplishing' basis [for imposing vicarious liability] . . . by a more fully elaborated treatment of apparent authority and by the duty of reasonable care that a principal owes to third parties with whom it interacts through employees and other agents" elsewhere in the Restatement. 2 Restatement Agency, 3d, § 7.08, comment b, p 228. Thus, there has arguably been no "change[] in the law," given that the Third Restatement of Agency addresses the same concerns represented by the aided-by-agency exception from the Second Restatement of Agency. And, regardless, the Restatement has no precedential value and, thus, is not "the law." *Champion*, on the other hand, obviously has substantial precedential value as a well-established, unanimous opinion of this Court. Accordingly, any support for overruling *Champion* that the majority derives from the fact that the Third Restatement of Agency no longer expressly includes the aided-by-agency exception is unpersuasive, especially when, as noted later in this opinion, other jurisdictions continue to apply that exception.

[14] Although the majority mistakenly attributes this premise to me, see *ante* at 35, it was actually the unanimous *Champion* Court that concluded that its holding was consistent with the majority of other jurisdictions. I do, however, agree with *Champion*'s conclusion, given that, as explained in footnote 15 of this opinion, the United States Supreme Court and many states apply *Champion*-like exceptions in the context of civil rights cases.

however, claims that *Champion* and this dissent err in this determination because it is improper to consider federal caselaw.

Although the majority is correct that we are not bound by federal caselaw, it can be instructive, particularly when the federal and state statutes at issue are similar. See, e.g., *People v Victor*, 287 Mich 506, 548; 283 NW 666 (1939) (endorsing the use of federal caselaw in applying Michigan's Due Process Clause). Notably, the United States Supreme Court has concluded that the federal Civil Rights Act has a "broad remedial purpose[]," *Arizona Governing Comm for Tax Deferred Annuity & Deferred Compensation Plans v Norris*, 463 US 1073, 1090; 103 S Ct 3492; 77 L Ed 2d 1236 (1983), to "achieve equality . . . and remove barriers that have operated in the past to favor an identifiable group," *Griggs v Duke Power Co*, 401 US 424, 429-430; 91 S Ct 849; 28 L Ed 2d 158 (1971). Given that the legislative intent and purpose behind the CRA and the federal Civil Rights Act are strikingly similar, the United States Supreme Court's decision to adopt an exception to further that purpose in *Ellerth* and *Faragher* is persuasive authority in favor of upholding *Champion*.

Furthermore, regardless of whether "[o]nly a few jurisdictions have adopted the [aided-by-agency] exception wholesale . . . such that it applies to a typical tort claim," *ante* at 24 n 63, many of our sister states have—as this Court did in *Champion*—adopted comparable exceptions in the realm of civil rights sexual harassment cases in order to accomplish goals analogous to those in the CRA.[15] Thus, it is clear that

[15] See, e.g., *Farmers Ins Group v Santa Clara Co*, 11 Cal 4th 992, 1016 n 14; 47 Cal Rptr 2d 478; 906 P2d 440 (1995) (acknowledging that the applicable statutes "indicate that respondeat superior and scope of employment principles are supposed to play an integral role in fixing an

Champion is not an "inexplicable exception," *ante* at

employer's liability for both supervisor and nonsupervisor sexual harassment" but applying the aided-by-agency exception because "it is reasonably clear that the purpose underlying the comprehensive statutory scheme is to ensure that all employers maintain their worksites free from prohibited sexual harassment, regardless of the lack of foreseeability of such harassment in their particular enterprises"); *Doe*, 2004 VT 37 at ¶ 39; 176 Vt at 494 (adopting the aided-by-agency exception, in part because it creates an "incentive for vigilance" by those in the best position to prevent harassing behavior); *Lehmann v Toys 'R' Us, Inc*, 132 NJ 587, 619; 626 A2d 445 (1993) (adopting the aided-by-agency-exception in sexual harassment cases to ensure "just results in the great variety of factual circumstances presented by sexual harassment cases and to accomplish the [statutory] purposes"); *Ocana v American Furniture Co*, 2004-NMSC-018, ¶ 31; 135 NM 539, 552; 91 P3d 58 (2004) (adopting the aided-by-agency theory because it "further[s] the policies that underlie tort law" by redistributing the economic burden from injured individuals and deterring objectionable conduct in the future); *College-Town, Div of Interco, Inc v Mass Comm Against Discrimination*, 400 Mass 156, 165; 508 NE2d 587 (1987) (noting that although the court was not bound by federal courts' interpretation of analogous federal statutes, vicarious liability based on a standard similar to the aided-by-agency exception was appropriate in order to remain consistent with the statute's purpose and clear legislative intent "that an employer be liable for discrimination committed by those on whom it confers authority"); *Frieler v Carlson Mktg Group, Inc*, 751 NW2d 558, 567-570 (Minn, 2008) (adopting the aided-by-agency exception for sexual harassment cases as consistent with the purposes of the Minnesota Human Rights Act); *Veco, Inc v Rosebrock*, 970 P2d 906, 914 (Alas, 1999) (adopting the aided-by-agency theory because harassment by supervisors is "facilitated, made more serious, and is less apt to be reported because supervisors are understood to be clothed with the employer's authority") (citation and quotation marks omitted); *Parker v Warren Co Utility Dist*, 2 SW3d 170, 176 (Tenn, 1999) (adopting the aided-by-agency exception for sexual harassment claims under Tennessee's human rights act for the reasons stated in *Ellerth* and *Faragher*); *American Gen Life & Accident Ins Co v Hall*, 74 SW3d 688, 692 (Ky, 2002) (acknowledging that Kentucky applies the aided-by-agency exception to sexual harassment claims under Kentucky's civil rights act consistently with *Ellerth* and *Faragher*); *Henningsen v Worldcom, Inc*, 102 Wash App 828, 843; 9 P3d 948 (2000) (applying the aided-by-agency exception in a sexual harassment case); *Wal-Mart Stores, Inc v Itz*, 21 SW3d 456, 470 (Tex App, 2000) (same); and *Edwards v Ohio Institute of Cardiac Care*, 170 Ohio App 3d 619, 627-628; 868 NE2d 721 (2007) (same).

21-22 n 54 (quotation marks and citation omitted), or "isolated aberration," *ante* at 25, nor is it "hard to square . . . with any conventional notion of agency," *ante* at 21 n 54 (quotation marks and citation omitted). Rather, *Champion* reflects a well-reasoned exception to the general rules of agency that many other jurisdictions have adopted in order to ensure that civil and human rights statutes are successful in achieving the goal of suppressing the evil of sexual harassment.

Finally, the fact that the majority's decision in this case is likely to result in serious detriment prejudicial to public interests weighs heavily in favor of upholding *Champion*. See *Petersen*, 484 Mich at 320 (opinion by MARILYN KELLY, C.J.). As discussed at length in this opinion, *Champion* properly recognized the significant public interest embodied in the CRA and adopted a narrow exception to traditional agency rules that accurately reflects the legislative intent to require employers to bear the costs of remedying and eradicating discrimination. By overruling *Champion*, the majority instead places that burden on the very people whom the CRA is intended to protect and who are powerless to prevent the discrimination that the CRA is intended to eliminate. The detriment to the public interest created by the majority opinion today is obvious and weighs heavily in favor of affirming *Champion*.

In summary, *Champion* (1) provides a practical and workable rule in furtherance of the purpose of the CRA, (2) has not been robbed of significant application or

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As these opinions make obvious, *Champion* by no means represents an earth-shattering decision in the realm of civil rights law, and, contrary to the majority's claim, in no way do I "concede that *Champion* was unprecedented . . . ." *Ante* at 30. Rather, because *Champion* accurately reflected the legislative intent behind the CRA, I believe that *Champion* rests on the precedent of the CRA itself.

justification because it remains a highly significant and relevant guidepost in the area of civil rights law, (3) is consistent with the caselaw of other jurisdictions that have adopted the aided-by-agency exception, and (4) avoids a serious detriment prejudicial to public interests. Therefore, in my view, the principles of stare decisis do not support the majority's decision to overrule *Champion*.

IV. THE MAJORITY REACHES THE WRONG RESULT UNDER ANY STANDARD

The majority's application of its own standard is hopelessly flawed. The majority immunizes defendants from liability in this case by concluding that Johnson's acts were unforeseeable. *Ante* at 16. The majority supports this conclusion by claiming that, even when viewed in the light most favorable to plaintiff, Johnson's past violent conduct toward members of the public *and inmates* merely amounted to "a propensity to disobey work-related protocol . . . ."[16] *Ante* at 16. Furthermore, the majority concludes that Johnson's rape of plaintiff was "highly unpredictable," *ante* at 13, and, "in essence, unpreventable," *ante* at 15.

The majority's characterization of Johnson's conduct is extraordinarily one-sided, however. First, Johnson's conduct was clearly not "unpreventable" because defendants had a policy in place that required a female officer to be present anytime a female inmate was in the jail.

[16] The majority attempts to downplay Johnson's prior violent conduct toward inmates by emphasizing that it was directed at a male inmate who had provoked Johnson. Although inconvenient to the majority's analysis, it is notable that defendants considered Johnson's actions "misconduct" and reprimanded him for it. Therefore, it appears that defendants did not consider Johnson's violent conduct toward an inmate as insignificant as the majority would have us believe.

Presumably, the motivation behind this policy is at least in part to prevent the type of conduct that Johnson committed in this case. Defendants violated that policy on the night in question, which allowed Johnson to use the supervisory powers delegated to him by defendants to violently rape plaintiff. Thus, the rape of plaintiff was entirely preventable, had defendants merely followed their own policy. Furthermore, the fact that such a policy existed also strongly implies that defendants considered conduct like Johnson's foreseeable. Therefore, regardless of whether the rape was preventable, defendants' policy is one of several factors that create a genuine issue of material fact regarding whether Johnson's conduct was *foreseeable*, even under the majority's flawed new test.[17]

Second, as the majority concedes, Johnson's alleged threatening calls to his landlord and the physical altercation *with an inmate* reveal Johnson's tendency to react violently when provoked. One would think that working as a deputy in a jail would entail frequent provocation by inmates. Accordingly, tendencies such as those displayed by Johnson, when viewed in the light most favorable to plaintiff, present a genuine issue of material fact regarding whether his subsequent violent rape *of an inmate* was sufficiently foreseeable to hold defendants vicariously liable.

The majority strains to support the weight of its misguided holding by citing the majority opinion in *Brown v Brown*, 478 Mich 545; 739 NW2d 313 (2007).[18]

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[17] The majority bristles at my characterization of its test as "new." See *ante* at 14 n 32. However, given that the majority overrules *Champion*, which it admits would otherwise apply to this case, classifying its test as "new" is entirely accurate, in my judgment.

[18] Although I continue to adhere to my dissent in *Brown*, 478 Mich at 570-580 (CAVANAGH, J., dissenting), I will apply the majority opinion from *Brown* because, even under the *Brown* majority's excessively narrow

In *Brown*, the attacker had no criminal history and had not previously committed any violent acts but had repeatedly made heinous sexual comments to the plaintiff of which the defendant-employer was aware. Subsequently, while working with the plaintiff on the night shift, the attacker violently raped the plaintiff. The *Brown* majority concluded that the defendant's knowledge of the attacker's comments alone were not sufficient to make the subsequent rape foreseeable. *Id*. at 554-555. The *Brown* majority chastised the Court of Appeals panel in that case for relying on *Hersh v Kentfield Builders, Inc*, 385 Mich 410; 189 NW2d 286 (1971), to reach the opposite conclusion because, according to the *Brown* majority, *Hersh* was distinguishable on its facts. In *Hersh*, an employee who had a prior manslaughter conviction violently attacked a client of the defendant-employer. This Court unanimously held that the defendant-employer was liable for its employee's violent attack on the client because the defendant knew of the employee's past violent act. *Id*. at 413.[19] The *Brown* majority seized on this reasoning to conclude that the defendant in *Brown* could not be liable for its employee's rape of the plaintiff because the employee had only engaged in "boorish" sexual *comments* toward the plaintiff but had no history of violent *acts*. *Brown*, 478 Mich at 557-562.

Although the *Brown* majority's analysis created a dangerous rule whereby "*no* infirmity of character, shown by speech, [is] sufficient to allow a jury to decide whether, in light of the employee's conduct, the employer had a duty to act," *id*. at 576 (CAVANAGH, J.,

standard of foreseeability, this case presents a genuine issue of material fact. And because I apply the rule from the majority opinion in *Brown*, the majority's critique of the *Brown* dissent, *ante* at 14 n 32, is entirely irrelevant.

[19] Justice BLACK concurred in the result. See *Hersh*, 385 Mich at 416.

dissenting), Johnson's conduct in this case, when viewed in the light most favorable to plaintiff, was sufficient to raise a genuine issue of material fact even under the rule in *Brown*. Johnson did not merely engage in sexual comments toward plaintiff; rather, he had a specific history of violent and abusive behavior toward inmates.[20] Therefore, because the unanimous

[20] The majority claims that the "dissimilar" nature and the "temporal distance" between Johnson's past violent conduct and the rape at issue immunizes defendants from foreseeability as a matter of law. First, these arguments abandon the reasoning from *Hersh* because, in that case, the attacker's conviction for manslaughter occurred 10 years before the attack in question, and the defendant in *Hersh* "was not aware of [the attacker's] specific convictions . . . ." *Hersh v Kentfield Builders, Inc*, 19 Mich App 43, 45 n 1; 172 NW2d 56 (1969). Thus, contrary to the majority's analysis today, the caselaw *does not* hold that an employee's conduct is only foreseeable to an employer if the employee had recently committed the precise conduct at issue.

Second, these arguments also demonstrate that the majority's new test for quid pro quo sexual harassment cases creates a moving target that is impossible for plaintiffs to hit. In *Brown*, the majority claimed that the attacker's aggressive sexual comments were not sufficient to make it foreseeable that the attacker would later rape the target of those comments. In this case, even though Johnson had committed a violent act against an inmate in the past, the majority claims that this conduct occurred too long ago and was too dissimilar to the conduct at issue. The majority makes no effort to explain why the acceptable 10-year gap in *Hersh* is substantially different from the 13-year gap in this case and only summarily argues that Johnson's prior violent act against an inmate was too dissimilar to his violent rape of plaintiff while she was an inmate. *Ante* at 16-17 n 36. Viewed in the light most favorable to plaintiff, I fail to see a difference between a violent physical altercation with an inmate and a subsequent violent rape of an inmate that is sufficient to justify deciding this case as a matter of law. Rather, given the substantial similarities between the facts of this case and the facts in *Hersh*, I believe that this Court's unanimous conclusion in *Hersh* that "[w]hether the employer knew or should have known of [the employee's] vicious propensities should not be determined by any court as a matter of law, but by the jury" is equally applicable to this case, even under the majority's flawed new test. *Hersh*, 385 Mich at 415. But under the majority position, this is apparently not so, given that the majority seemingly believes that an employee's act of committing a rape is only foreseeable if the employer knows that the employee actually raped someone in the recent past. The unworkability of such a requirement is obvious.

Hersh Court and the majority in *Brown* concluded that an employee's prior violent criminal acts are generally sufficient to put a defendant on notice of the employee's propensity to commit similar violent acts,[21] defendants' knowledge of Johnson's prior violent acts is sufficient to at least raise a genuine issue of material fact regarding the foreseeability of his eventual rape of plaintiff.[22] Accordingly, even under the majority's newly adopted standard for quid pro quo sexual harassment claims under the CRA, the majority reaches the wrong result in this case.

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[21] Specifically, *Hersh*, 385 Mich at 413, stated that " '[t]he employer's knowledge of past acts of impropriety, violence, or disorder on the part of the employee is *generally considered sufficient to forewarn the employer*,' " quoting 34 ALR2d 390, § 9 (emphasis added), and the majority in *Brown*, 478 Mich at 560, quoted this passage from *Hersh*.

[22] Although the majority opinion cites *Brown*, 478 Mich at 555, for the proposition that "[e]ven the incident of aggression [toward an inmate] did not put defendants on reasonable notice that Johnson would sexually assault an inmate [because] violent actions do not inevitably lead to acts of criminal sexual conduct," *ante* at 16, the cited portion of *Brown* does not actually support that conclusion. Rather, the relevant portion of *Brown* states that "[*c*]*omments* of a sexual nature do not inexorably lead to criminal sexual conduct any more than an exasperated, angry *comment* inexorably results in a violent criminal assault." *Brown*, 478 Mich at 555 (emphasis added). Furthermore, *Brown* later stated, while discussing *Hersh*, that "it is the employee's *known past acts* that provide a basis for the employer's knowledge of the employee's 'impropriety, violence, or disorder' and that those acts potentially place an employer on notice of the employee's violent propensities." *Id.* at 561. Therefore, it appears that the majority has even further limited the scope of previous conduct by an employee that will be sufficient to put an employer on notice of the employee's violent propensities. Disregarding the fact that a rape is an "incident of aggression," the majority claims that Johnson's previous "incident of aggression" toward an inmate did not make his subsequent rape of plaintiff foreseeable because the previous "incident of aggression" was not a "sexual assault." The majority's efforts to distinguish the differences between various violent acts leaves plaintiffs vulnerable to harm and immunizes employers from liability unless an employee commits the exact same act that he or she previously committed. In my view, the majority's analysis is arbitrary and undercuts the clear legislative intent of the CRA.

Finally, by overruling *Champion*, the majority has caused a major shift in Michigan's quid pro quo sexual harassment jurisprudence. Thus, even if I agreed with the majority's new standard, I could not support its hasty decision to reverse the judgment of the Court of Appeals. As the majority readily admits, *Champion* clearly applies to this case, and plaintiff's arguments appropriately focused on the principles set forth in *Champion* rather than the majority's newly imposed foreseeability analysis.[23] As a result, the Court of Appeals did not consider the merits of plaintiff's claims under the foreseeability standard that the majority now

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[23] Curiously, the majority proclaims that "[n]o meaningful distinction can be drawn between the facts in *Champion* and those in the present matter," *ante* at 26, but later finds fault in my conclusion that a straightforward application of *Champion* is appropriate in this case. My conclusion is not faulty; rather, it simply reflects an adherence to the doctrine of stare decisis. It is the majority that falters in its effort to satisfy the burden of explaining its imprudent decision to forgo precedent.

Indeed, the majority's argument that the "conflicting dispositions in the courts below" support its decision to overrule *Champion*, *ante* at 33, is simply one more example of the majority's misplaced efforts to satisfy its burden. While it is true that the trial court in this case applied *Zsigo* and the Court of Appeals applied *Champion*, a simple answer exists for this apparent conflict. Although our trial courts work diligently and, in the vast majority of instances, reach the correct result, the trial courts do, on occasion, err. Indeed, the Court of Appeals and this Court exist in large part to address this reality.

In this case, the trial court erred by applying *Zsigo* because *Zsigo* did not consider a quid pro quo sexual harassment claim. Rather, as the Court of Appeals correctly determined, the proper course of conduct in this quid pro quo sexual harassment case was to apply *Champion*, not *Zsigo*. Indeed, as repeatedly noted in this dissent, the *Zsigo* majority recognized that *Champion* applies "in the context of quid pro quo sexual harassment under MCL 37.2103(i)." *Zsigo*, 475 Mich at 224 n 19. Therefore, the resolution of this case should be simple: *Champion* should apply because this is a quid pro quo sexual harassment case. It is the majority that needlessly injects "conflicting precedents and principles." *Ante* at 33.

adopts. Accordingly, the majority should not reach the merits of this case because this unexpected shift away from *Champion* prevented plaintiff from making arguments related to the standard that the majority now applies. Rather, given its holding, the majority should remand this case to the lower courts for further proceedings so that plaintiff may develop arguments related to the majority's newly applicable, yet erroneous, standard for quid pro quo sexual harassment claims.

V. CONCLUSION

I disagree with the majority's decision to overrule *Champion* because that case was correctly decided and furthers the legislative intent and purpose of the CRA. Moreover, the doctrine of stare decisis weighs against overruling *Champion*. Furthermore, the majority misapplies its newly created standard in this case and usurps the role of the jury when it concludes that defendants are entitled to a favorable decision as a matter of law. Accordingly, I dissent.

MARILYN KELLY, J., concurred with CAVANAGH, J.

HATHAWAY, J. (*dissenting*). I dissent from the majority's decision to overrule *Champion v Nation Wide Security, Inc*, 450 Mich 702; 545 NW2d 596 (1996). I fully agree with and join parts I, II, IV, and V of Justice CAVANAGH's dissenting opinion. It is my strong belief that *Champion*, a unanimous decision of this Court,[1] was not only correctly decided, but served to protect the rights of victims of discrimination. Because the majority overrules correctly decided precedent, no stare decisis analysis is necessary. The majority's analysis and

[1] The concurring justices joined the analysis in full. See *Champion*, 450 Mich at 714 (BOYLE, J., concurring).

conclusions are fundamentally flawed, and today's decision significantly undermines the "legislative intent that employers, not the victims of sexual harassment, bear the costs of remedying and eradicating discrimination." *Champion*, 450 Mich at 714. Finally, for the reasons given in Justice CAVANAGH's thoughtful and well-reasoned dissenting opinion, the majority's decision is contrary to the rule of law and results in the dismantling of the Michigan Civil Rights Act, MCL 37.2101 *et seq*. Accordingly, I dissent.

LIGONS v CRITTENTON HOSPITAL

Docket No. 139978. Argued January 19, 2011 (Calendar No. 3). Decided July 29, 2011.

Dujuan Ligons, as personal representative of the estate of Edris Ligons, brought a wrongful-death medical malpractice action in the Oakland Circuit Court against Crittenton Hospital, also known as Crittenton Hospital Medical Center; David B. Bauer, M.D.; and Bauer's practice group, Rochester Emergency Group, P.C. The decedent had gone to the Crittenton Hospital emergency room, complaining of vomiting, diarrhea, chills, and a fever after a recent colonoscopy. Bauer treated her in the emergency room. After the decedent refused to be admitted to the hospital, she was treated for dehydration, given antibiotics, and discharged with instructions to follow up with her personal physician the next day. The decedent did so and was immediately sent back to the emergency room, where she was admitted. Further testing and exploratory surgery revealed that the decedent had suffered a perforated colon. She never recovered and died several days later. In the action, Bauer and Rochester Emergency moved for summary disposition, arguing that plaintiff's notice of intent to sue (NOI), supplemental NOI, and affidavits of merit (AOMs) failed to comply with the governing statutes. Crittenton concurred in the motion. The court, Gene Schnelz, J., denied the motion. The Court of Appeals denied Bauer and Rochester Emergency leave to file an interlocutory appeal. In lieu of granting leave to appeal, the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted. 482 Mich 1005 (2008). On remand, the Court of Appeals, TALBOT, P.J., and HOEKSTRA, J. (FITZGERALD, J., concurring in part and dissenting part), concluded that plaintiff's NOIs collectively satisfied the requirements of the NOI statute, MCL 600.2912b, but further concluded that neither AOM contained the statement required by MCL 600.2912d(1)(d) describing the manner in which the breach of the standard of practice or care was the proximate cause of the alleged injury. The Court of Appeals reversed the decision of the trial court and remanded the case for entry of an order of dismissal with prejudice. 285 Mich App 337 (2009). The Supreme Court granted plaintiff's application for leave to appeal. 486 Mich 977 (2010).

In an opinion by Justice ZAHRA, joined by Chief Justice YOUNG and Justices MARKMAN and MARY BETH KELLY, the Supreme Court *held*:

A defective affidavit of merit may not be retroactively amended, and the proper response to a defective affidavit of merit is dismissal.

1. A plaintiff's failure to file a timely AOM or to file a timely AOM that satisfies the requirements of MCL 600.2912d(1) generally results in dismissal of the case. The dismissal must be without prejudice unless other grounds for dismissal exist, such as the expiration of the limitations period. The timely filing of a defective AOM with the complaint tolls the limitations period unless and until the court finds the AOM defective. The timely filing of a defective AOM cannot toll a saving period.

2. Plaintiff's AOMs failed to provide any statement of the manner in which the breach of the standard of care by defendants was the proximate cause of the injury alleged, as was required under MCL 600.2912d(1)(d). It was insufficient to simply state the result when plaintiff was required to state the manner in which there was a breach.

3. MCR 2.118 permits the amendment of pleadings, and provides that the amendment relates back to the date of the original pleading, in certain circumstances. MCR 2.110(A) defines the term "pleading," but an AOM does not fit that definition. Therefore, an AOM was not a pleading that could have been amended under the version of MCR 2.118 in effect when this case was pending in the trial court. Further, permitting amendment of a deficient AOM under MCR 2.118 would run directly counter to the statutes governing medical malpractice actions, particularly MCL 600.2912d. The statute's purpose is to require certification of the merit of the claim by an expert at the beginning of a case, and it provides two alternative time frames if the plaintiff is unable to comply with the mandate to file an AOM with the complaint. Allowing subsequent amendment of an AOM would conflict with those legislative remedies.

4. Under MCL 600.2301, Michigan courts may amend any process, pleading, or proceeding for the furtherance of justice. An attachment to a complaint or pleading, however, is neither a process nor a proceeding under MCL 600.2301. Accordingly, a deficient AOM may not be amended under the statute.

5. MCR 2.112(L) was amended in 2010 to permit amendment of an AOM in accordance with MCR 2.118 and MCL 600.2301. MCR 2.118 was amended in 2010 to provide that an amendment of

an AOM relates back to the date of the original filing of the affidavit. However, plaintiff could not amend his AOMs in light of the 2010 amendments of the court rules because the amended rules were given prospective effect, and retroactive application of the amendments would result in prejudice to defendants.

6. The Court of Appeals correctly dismissed plaintiff's case with prejudice. Although the timely filing of a defective AOM tolls the limitations period until a court finds the AOM defective, an AOM filed during a saving period after the limitations period has expired tolls nothing because the limitations period has run and the saving period may not be tolled. Plaintiff filed suit during the saving period afforded him under MCL 600.5852, which permits the personal representative of a decedent's estate to commence an action at any time within two years after letters of authority are issued even though the period of limitations has run as long as the action is commenced within three years after the limitations period has expired. In this case, because the limitations period had already expired, there was no period left to toll under MCL 600.5856(a) when plaintiff filed the complaint.

Affirmed.

Justice CAVANAGH, joined by Justice MARILYN KELLY, dissenting, would have held that MCL 600.2301 applies when the contents of an AOM are deficient and would have remanded the case to the trial court for consideration under MCL 600.2301. MCL 600.2912d(1)(d) only requires a statement regarding the alleged manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the NOI. A heightened level of specificity in the contents of an AOM is not required. But assuming that the AOMs in this case were deficient, MCL 600.2301 should apply to allow a cure of the alleged deficiency because an AOM is part and parcel of a medical malpractice proceeding given that it must be filed with the complaint and permitting amendment of a defective AOM would be in the furtherance of justice and would not affect defendants' substantial rights.

Justice HATHAWAY, dissenting, would have held that plaintiff's AOMs were not defective and that even in cases with defective AOMs, MCL 600.2301 provides relief. Plaintiff's AOMs contained the statements regarding causation required under MCL 600.2912d(1)(d). The Legislature chose not to incorporate into the AOM statute language heightening the required level of specificity. Accordingly, under the statutory language, the manner in which the breach of the standard of practice or care was the proximate cause of the injury may be set forth in a succinct description.

Additionally, the AOM must be read in concert with the NOI. In this case, plaintiff's AOMs, when read in concert with the NOI, set forth the required statement regarding causation. The majority further erred by holding that the only remedy for a defective AOM was dismissal given that the Legislature specifically rejected the inclusion of a mandatory dismissal clause when it enacted the statute. Under MCL 600.2301, courts must disregard defects in the contents of an AOM unless substantial rights are affected because an AOM is part of the action or proceeding. And even when an AOM has content defects that affect the substantial rights of a party, a court should allow amendment when necessary for the furtherance of justice.

1. NEGLIGENCE — MEDICAL MALPRACTICE — AFFIDAVITS OF MERIT — FAILURE TO SATISFY STATUTORY REQUIREMENTS — REMEDY.

A medical malpractice plaintiff's failure to file a timely affidavit of merit that satisfies the statutory requirements generally results in dismissal of the case; the dismissal must be without prejudice unless other grounds for dismissal exist, such as the expiration of the limitations period (MCL 600.2912d[1]).

2. NEGLIGENCE — MEDICAL MALPRACTICE — AFFIDAVITS OF MERIT — AMENDMENT.

A court may amend any process or proceeding for the furtherance of justice, but an affidavit of merit in a medical malpractice case is neither a process nor a proceeding and, thus, may not be amended as such (MCL 600.2301).

3. NEGLIGENCE — MEDICAL MALPRACTICE — AFFIDAVITS OF MERIT — REQUIREMENTS.

A statement that the alleged malpractice caused the injury is insufficient to satisfy the statutory requirement that the plaintiff's affidavit of merit in a medical malpractice action state "the manner in which" the breach of the standard of practice or care was the proximate cause of the injury (MCL 600.2912d[1][d]).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Turner & Turner, P.C.* (by *Matthew L. Turner*), for Dujuan Ligons.

Tanoury, Nauts, McKinney & Garbarino, P.L.L.C. (by *William A. Tanoury* and *Anita Comorski*), for David Bauer and Rochester Emergency Group, P.C.

Mellon Pries, P.C. (by *James T. Mellon* and *David A. Kowalski*), for Crittenton Hospital Medical Center.

ZAHRA, J. We are called upon to answer the question whether a medical malpractice suit must be dismissed if a defective affidavit of merit (AOM) is filed after both the limitations period and the saving period have expired. We hold that in such cases, dismissal with prejudice must follow because allowing amendment of the deficient AOM would directly conflict with the statutory scheme governing medical malpractice actions, the clear language of the court rules, and precedent of this Court. Accordingly, we affirm the judgment of the Court of Appeals dismissing plaintiff's case with prejudice.

I. FACTS AND PROCEDURAL HISTORY

Edris Ligons underwent a colonoscopy on January 14, 2002, and four days later developed vomiting, diarrhea, chills, and fever.[1] On January 22, 2002, still suffering from those symptoms, Ligons went to the emergency room at defendant Crittenton Hospital, where she was treated by defendant Dr. David Bauer. An abdominal x-ray suggested the possibility of a partial small-bowel obstruction. When Ligons refused to be admitted to the hospital, she was given antibiotics, treated for dehydration, and discharged with instructions to follow up with her treating physician the next day. Ligons did so and was immediately sent to the emergency room, where she was admitted.

After extensive testing and the involvement of seven doctors, it was determined that surgery was necessary. Ligons initially refused any surgery, but eventually agreed. Exploratory surgery performed on January 24, 2002, revealed a perforated colon, an inflamed pelvic

[1] The physician who performed the colonoscopy is no longer a party to this suit.

mass, and an abscess. The exploratory surgery further showed that Ligons had an advanced form of liver failure and that her liver had become hard and rocklike in appearance. Ligons had been an alcoholic for more than 30 years and suffered from acute cirrhosis with ascites, alcoholic pancreatitis, alcoholic hepatitis, coagulopathy, diverticulosis coli, and colon polyps. Removal of her colon was impossible because of these preexisting conditions. Ligons never recovered from the surgery and died on January 29, 2002.

Plaintiff was appointed personal representative of Ligon's estate on February 22, 2005, and delivered to defendants a notice of intent to sue[2] (NOI) on June 8, 2005. On October 21, 2005, plaintiff delivered a supplemental NOI providing more detail regarding proximate cause. He filed a complaint in the Oakland Circuit Court on April 7, 2006, accompanied by two AOMs.

The first AOM, signed March 8, 2005, was executed by Dr. George Sternbach, an emergency-medicine specialist. Although the AOM contained 23 paragraphs regarding the manner in which the standard of care had been breached, only two of those paragraphs pertained specifically to this case:

> v. [The failure to a]dmit the patient to the hospital on January 22, 2002.
>
> w. [The failure to o]btain appropriate consults on January 22, 2002.

Regarding the manner in which these breaches were the proximate cause of the injury, the AOM provided, "As a direct and proximate cause of the imprudent acts and omission committed by the individuals identified herein, Edris Ligons, died."

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[2] See MCL 600.2912b.

The second AOM, signed on June 17, 2005, by Dr. Fred Thomas, did not address the required standard of practice or care, the breach of the standard of care, or the actions that should have been taken or omitted to comply with the standard of care. Rather, the Thomas AOM addressed only the manner in which the breach of the standard of practice or care was the proximate cause of the alleged injury: "It is my opinion that had the defendants admitted the patient to the hospital on January 22, 2002, and obtained the appropriate consults on January 22, 2002, as outlined in Dr. Sternbach's affidavit[,] that Edris Ligons would not have died."

In March 2007, Bauer and defendant Rochester Emergency Group, P.C. (Bauer's practice group) moved for summary disposition, arguing that plaintiff's NOIs and AOMs did not comply with the governing statutes. In April 2007, Crittenton concurred in the motion. The trial court denied defendants' motions on May 22, 2007.

Bauer and Rochester Emergency applied for leave to file an interlocutory appeal, which the Court of Appeals initially denied.[3] Bauer and Rochester Emergency then applied for leave to appeal in this Court and, in lieu of granting their application, we remanded the case to the Court of Appeals for consideration as on leave granted.[4] The Court of Appeals later granted Crittenton's application for leave to file a delayed cross-appeal.[5]

On remand from this Court, the Court of Appeals concluded that plaintiff's two NOIs collectively satisfied

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[3] *Ligons v Crittenton Hosp*, unpublished order of the Court of Appeals, entered January 16, 2008 (Docket No. 278622).

[4] *Ligons v Crittenton Hosp*, 482 Mich 1005 (2008).

[5] *Ligons v Crittenton Hosp*, unpublished order of the Court of Appeals, entered March 2, 2009 (Docket No. 288793).

the requirements of MCL 600.2912b.[6] But a majority of the panel disagreed with the trial court's ruling that the AOMs were sufficient, concluding that neither AOM contained the required statement describing "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice."[7] The majority reasoned that "it is insufficient to merely allege that the defendant's alleged negligence caused the injury," and the AOMs "contain[ed] no explanation regarding how Dr. Bauer's decision not to admit the decedent on January 22, 2002, or obtain appropriate consultations was the proximate cause of the decedent's death."[8] "[E]ven when read as a whole," the AOMs "establish[ed] no connection between the purpose of the consultations, or what condition they might have revealed, and the cause of the decedent's death," nor did they explain how a one-day delay in admitting Ligons resulted in death rather than recovery.[9]

Recognizing that the defective AOMs required dismissal of the case under *Kirkaldy v Rim*,[10] the Court of Appeals further held that dismissal in this case had to be with prejudice.[11] The Court of Appeals reasoned that, although filing a complaint and an AOM tolls the

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[6] *Ligons v Crittenton Hosp*, 285 Mich App 337, 343-349; 776 NW2d 361 (2009).

[7] MCL 600.2912d(1)(d); *Ligons*, 285 Mich App at 349-351. The Court of Appeals partial dissent would have found the AOMs sufficient to comply with MCL 600.2912d, but acknowledged that the AOMs did not specify how the failure to admit Ligons to the hospital and obtain the appropriate consults on January 22, 2002, caused Ligons's death or how taking these actions could have prevented her death eight days later. *Ligons*, 285 Mich App at 360-361 (FITZGERALD, J., concurring in part and dissenting in part).

[8] *Id.* at 350 (majority opinion), citing *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 699 n 16; 684 NW2d 711 (2004).

[9] *Ligons*, 285 Mich App at 350.

[10] *Kirkaldy v Rim*, 478 Mich 581; 734 NW2d 201 (2007).

[11] *Ligons*, 285 Mich App at 354.

statutory limitations period pursuant to MCL 600.5856(a) until the AOM is successfully challenged,[12] tolling was unavailable here because plaintiff had not filed his complaint within the limitations period. Plaintiff filed his complaint after the limitations period expired, but within the saving period afforded him as a personal representative under MCL 600.5852. Under *Waltz v Wyse*,[13] statutes that toll periods of limitations or statutes of repose, such as MCL 600.5856(a), do not toll saving provisions.[14] The Court of Appeals concluded that no tolled time remained during which plaintiff could refile his suit after defendants successfully challenged his AOMs. Thus, dismissal with prejudice was required on statute-of-limitations grounds.[15]

Finally, the Court of Appeals rejected plaintiff's argument that he should be permitted to amend his defective AOMs under the then existing version of MCR 2.118(A), which permitted the amendment of "pleadings." The Court noted that the term "pleading" was restrictively defined by MCR 2.110(A) to include only complaints, cross-claims, counterclaims, third-party complaints, answers to any of these documents, and replies to those answers. This list does not include "mandatory attachments" such as AOMs.[16] Finding no "positive authority suggesting that an affidavit of merit may be amended pursuant to MCR 2.118(A)," the Court concluded that "the only permissible remedy for a defective affidavit of merit is the one prescribed in *Kirkaldy*, which is dismissal."[17] Accordingly, the Court

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[12] *Id.* at 353-354, citing *Kirkaldy*, 478 Mich at 585-586.

[13] *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004).

[14] *Ligons*, 285 Mich App at 352, 354.

[15] *Id.* at 354.

[16] *Id.* at 355.

[17] *Id.*

of Appeals reversed the trial court and remanded the case for entry of an order of dismissal with prejudice.[18]

Plaintiff applied to this Court for leave to appeal the Court of Appeals' decision. We granted leave and directed the parties to address the following issues: "(1) whether the plaintiff may amend his affidavits of merit in light of *Bush v Shabahang*, 484 Mich 156 [772 NW2d 272] (2009), and/or MCL 600.2301, and (2) whether the recent amendment of MCR 2.118 applies to the plaintiff's affidavits of merit."[19]

II. STANDARD OF REVIEW

We review de novo a trial court's ruling on a motion for summary disposition.[20] This case involves questions of statutory interpretation, which we also review de novo.[21] We interpret court rules using the same principles that govern the interpretation of statutes.[22] Our goal when interpreting and applying statutes or court rules is to give effect to the plain meaning of the text. If the text is unambiguous, we apply the language as written without construction or interpretation.[23]

III. ANALYSIS

A. INTERPRETATION AND APPLICATION OF MCL 600.2912d

MCL 600.2912d was enacted in 1986 and amended in 1993 as an element of broad tort reforms established by

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[18] *Id*. at 356.

[19] *Ligons v Crittenton Hosp*, 486 Mich 977 (2010).

[20] *Haynes v Neshewat*, 477 Mich 29, 34; 729 NW2d 488 (2007).

[21] *Id.*

[22] *Marketos v American Employers Ins Co*, 465 Mich 407, 412-413; 633 NW2d 371 (2001).

[23] See *Haynes*, 477 Mich at 35; *Marketos*, 465 Mich at 413.

the Legislature.[24] In part, the legislation placed "enhanced responsibilities" on medical malpractice plaintiffs.[25] MCL 600.2912d(1) requires the following:

> Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169].[26] The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and *shall contain a statement of each of the following*:
>
> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) *The manner in which* the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. [Emphasis added.]

MCL 600.2912d(2) and (3) extend the time during which an AOM may be filed under certain circumstances:

> (2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the

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[24] 1986 PA 178; 1993 PA 78; see *Scarsella v Pollak*, 461 Mich 547, 548; 607 NW2d 711 (2000); *Solowy v Oakwood Hosp Corp*, 454 Mich 214, 228; 561 NW2d 843 (1997).

[25] *Solowy*, 454 Mich at 228.

[26] MCL 600.2169 governs the qualifications of expert witnesses in medical malpractice actions.

> plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).
>
> (3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in [MCL 600.2912b(6)], the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.

In *Scarsella v Pollak*,[27] this Court addressed the consequences of a plaintiff's failure to file an AOM with the complaint as required by the statute. We stressed the Legislature's " 'mandatory and imperative' " language:[28] MCL 600.2912d(1) requires that a plaintiff "*shall* file with the complaint an affidavit of merit . . . ."[29] In light of this legislative requirement, we held that " 'for statute of limitations purposes in a medical malpractice case, the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit.' "[30] We rejected the plaintiff's argument that he should have been permitted to amend his complaint by appending an untimely AOM, which would have been related back to the time the complaint was filed under MCR 2.118(D),[31] because permitting such amendment would have " 'effectively repeal[ed] the statutory affidavit of merit requirement' ":[32]

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[27] *Scarsella*, 461 Mich 547.

[28] *Scarsella*, 461 Mich at 549, quoting *Scarsella v Pollak*, 232 Mich App 61, 64; 591 NW2d 257 (1998).

[29] Emphasis added.

[30] *Scarsella*, 461 Mich at 549, quoting *Scarsella*, 232 Mich App at 64.

[31] At the time *Scarsella* was decided, MCR 2.118(D) provided:

> Except to demand a trial by jury under MCR 2.508, an amendment relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading.

[32] *Scarsella*, 461 Mich at 550, quoting *Scarsella*, 232 Mich App at 65.

> "[M]edical malpractice plaintiffs could routinely file their complaints without an affidavit of merit, in contravention of the court rule and the statutory requirement, and 'amend' by supplementing the filing with an affidavit at some later date. This, of course, completely subverts the requirement of MCL 600.2912d(1) . . . that the plaintiff 'shall file with the complaint an affidavit of merit,' as well as the legislative remedy of MCL 600.2912d(2) . . . , allowing a twenty-eight-day extension in instances where an affidavit cannot accompany the complaint."[33]

In other words, *Scarsella* established that, when a plaintiff "wholly omits to file the affidavit required by MCL 600.2912d(1)," "the filing of the complaint is ineffective, and does not work a tolling of the applicable period of limitation."[34] When the untolled period of limitations expires before the plaintiff files a complaint accompanied by an AOM, the case must be dismissed with prejudice on statute-of-limitations grounds.[35] Dismissal without prejudice is proper, however, if the untolled limitations period has not yet expired.[36]

The issue whether a timely filed yet defective AOM tolled the limitations period was resolved in *Kirkaldy*. *Kirkaldy* observed that, under MCL 600.5856(a),[37] MCL 600.2912d, and *Scarsella*, "the period of limitations is

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[33] *Scarsella*, 461 Mich at 550, quoting *Scarsella*, 232 Mich App at 65.

[34] *Scarsella*, 461 Mich at 553.

[35] *Id.* at 551-552.

[36] *Id.* (discussing the result in *Gregory v Heritage Hosp*, decided sub nom *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 [1999]).

[37] MCL 600.5856 provides, in pertinent part:

> The statutes of limitations or repose are tolled in any of the following circumstances:
>
> (a) At the time the complaint is filed, if a copy of the summons and complaint are served on the defendant within the time set forth in the supreme court rules.

tolled when a complaint and affidavit of merit are filed and served on the defendant."[38] Distinguishing a wholly absent AOM from a potentially defective but timely filed AOM, we stressed the holding in *Saffian v Simmons*[39] that " 'when an affidavit is filed, it is presumed valid. It is only in subsequent judicial proceedings that the presumption can be rebutted.' "[40] Accordingly, *Kirkaldy* held:

> [A] complaint and affidavit of merit toll the period of limitations until the validity of the affidavit is successfully challenged in "subsequent judicial proceedings." Only a successful challenge will cause the affidavit to lose its presumption of validity and cause the period of limitations to resume running.
>
> Thus, if the defendant believes that an affidavit is deficient, the defendant must challenge the affidavit. If that challenge is successful, the proper remedy is dismissal without prejudice. *Scarsella*, [461 Mich] at 551-552. The plaintiff would then have whatever time remains in the period of limitations within which to file a complaint accompanied by a conforming affidavit of merit.[41]

In *Waltz*, this Court clarified that MCL 600.5856, by its terms, tolls only periods of limitations or statutes of repose.[42] A saving statute is neither a statute of limitations providing a limitations period nor a statute of repose; rather, it is "an '*exception* to the statute of limitations' " that allows "commencement of a wrongful death action as many as three years after the applicable statute of limitations has expired."[43] In other words, once the

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[38] *Kirkaldy*, 478 Mich at 585.

[39] *Saffian v Simmons*, 477 Mich 8; 727 NW2d 132 (2007).

[40] *Kirkaldy*, 478 Mich at 586, quoting *Saffian*, 477 Mich at 13.

[41] *Kirkaldy*, 478 Mich at 586.

[42] *Waltz*, 469 Mich at 650.

[43] *Id.* at 650-651, quoting *Lindsey v Harper Hosp*, 455 Mich 56, 65; 564 NW2d 861 (1997); see also *Miller v Mercy Mem Hosp*, 466 Mich 196, 202; 644 NW2d 730 (2002) ("[MCL 600.5852] is a saving statute, not a statute of limitations.").

limitations period has run, tolling is no longer available, even if a saving statute would still allow commencement of the action.

Read together, the cases establish four points necessary to resolving the case currently before us. First, a plaintiff's failure to file a timely AOM *or* to file a timely AOM that satisfies the requirements of MCL 600.2912d(1) generally results in the dismissal of the case.[44] Second, that dismissal must be without prejudice unless other grounds for the dismissal exist, such as the expiration of the limitations period.[45] Third, the timely filing of a defective AOM with the complaint tolls the

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[44] Although Justice CAVANAGH discusses *Bush* in his dissent, he does not address why dismissal was inappropriate here given *Kirkaldy*'s holding that dismissal is the appropriate remedy for a defective AOM.

[45] Regardless of the fact that a provision for "mandatory dismissal with prejudice" is unnecessary in MCL 600.2912(d) because the statute of limitations necessitates dismissal, Justice HATHAWAY's dissent proceeds with a misguided and fruitless search for legislative direction that a defective AOM requires "mandatory dismissal with prejudice." Unsurprisingly, she finds no such mandate, concluding instead that the Legislature rejected "mandatory dismissal" in light of its interpretation of a provision of the initial notice legislation that the Legislature never adopted.

Although "actions of the Legislature in considering various alternatives in language in statutory provisions before settling on the language actually enacted" may constitute a legitimate form of legislative history, *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003), Justice HATHAWAY's use of it here exemplifies the shortcomings inherent in that approach. To reasonably discern legislative intent from rejected language, the rejected provision should be considered as a whole, rather than piecemeal as Justice HATHAWAY does by only looking at the first sentence of the provision. The full provision stated:

> Except as otherwise provided in this subsection, in an action alleging medical malpractice, the court shall dismiss a claim not included in the notice required under [MCL 600.2912f]. This subsection does not apply to a claim that results from previously unknown information gathered during discovery. [Format altered from strikethrough/insert format to show language as proposed.]

limitations period unless and until the court finds the AOM defective. Fourth, only limitations periods may be tolled; the timely filing of a defective AOM cannot toll a saving period.[46]

B. THE AFFIDAVITS OF MERIT WERE INSUFFICIENT

As noted in part III(A), MCL 600.2912d(1) sets forth several requirements for affidavits of merit: (1) a certification that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice, (2) the applicable

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On this same issue, Justice MARKMAN observed the following in *Bush*:

> As an initial matter, this seems entirely unrelated to the statute of limitations under which dismissal is granted. The Legislature's rejection of an unrelated provision can hardly be used to alter the clear meaning of a statute. It seems far more reasonable to conclude that the Legislature rejected this provision in favor of [MCL 600.2912b(3)], which provides for similar treatment of the same subject matter: undiscovered claims. . . . How can [Justice HATHAWAY] draw an informed conclusion concerning legislative history from a provision *never* enacted without even considering a provision that *has* been enacted and actually substituted for the never-enacted provision? [*Bush*, 484 Mich at 203-204 (MARKMAN, J., dissenting).]

[46] We decline plaintiff's invitation to overrule the prior decisions of this Court instead of adhering to the doctrine of stare decisis. "Stare decisis means 'To abide by, or adhere to, decided cases.' " *Robinson v Detroit*, 462 Mich 439, 463 n 20; 613 NW2d 307 (2000), quoting Black's Law Dictionary (rev 4th ed), p 1577. As both this Court and the United States Supreme Court have recognized, "[s]tare decisis is generally 'the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' " *Robinson*, 462 Mich at 463, quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998). Plaintiff has not argued why we should veer away from the stare decisis course, and we decline to revisit the body of caselaw involved here.

standard of practice or care, (3) the health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice, (4) the actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care, and (5) *the manner in which* the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice. The failure to include any of the required information renders the affidavit of merit insufficient.

Plaintiff's AOMs failed to provide any statement of the manner in which the breach of the standard of care was the proximate cause of the injury alleged. Dr. George Sternbach's AOM provided only that "[a]s a direct and proximate cause of the imprudent acts and omission committed by the individuals identified herein, Edris Ligons, died." Dr. Fred Thomas's AOM provided only: "It is my opinion that had the defendants admitted the patient to the hospital on January 22, 2002, and obtained the appropriate consults on January 22, 2002, as outlined in Dr. Sternbach's affidavit that Edris Ligons would not have died."[47] We have often said that it is insufficient to simply state the result when required to state the manner in which there was a breach: The answer to "*How* was the standard of care breached?" is never "The standard of care was

[47] Notably, Dr. Thomas's AOM did not include any statements regarding the applicable standard of practice or care, his opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice, or the actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care. Therefore, regardless of his statement of proximate cause, Dr. Thomas's AOM was statutorily deficient.

breached."[48] Similarly, answering the question "How was the breach the proximate cause of the injury?" requires more than "The breach caused the injury." In other words, the " 'mere correlation between alleged malpractice and an injury is insufficient to show proximate cause.' "[49] Contrary to the dissents' conclusions, this analysis does not require a heightened level of specificity; rather, it simply gives meaning to the level of specificity required by the statute itself. The Legislature requires a statement not just that a breach caused the injury, but the *manner in which* the breach caused the injury.[50]

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[48] See *Roberts*, 470 Mich at 696 n 14; *Boodt v Borgess Med Ctr*, 481 Mich 558, 560-561; 751 NW2d 44 (2008).

[49] *Swanson v Port Huron Hosp (On Remand)*, 290 Mich App 167, 176; 800 NW2d 101 (2010) (citation omitted).

[50] We also note that the dissents' interpretations render superfluous the words "manner in which" as used in MCL 600.2912d(1)(d). Simply stated, the dissents do not read MCL 600.2912d(1)(d) as requiring a statement of "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." Instead, the statute is read only to require a statement that "the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." Because the dissents' reading of MCL 600.2912d(1)(d) renders the words "manner in which" meaningless, it must be rejected. See *Pittsfield Charter Twp v Washtenaw Co*, 468 Mich 702, 714; 664 NW2d 193 (2003); see also *Grimes v Dep't of Transp*, 475 Mich 72, 89; 715 NW2d 275 (2006). Although Justice HATHAWAY insists that "[o]ur courts have consistently interpreted the word 'manner' . . . as allowing for a single word description such as 'homicide,' 'suicide,' or 'accident,' " *post* at 101, it is noteworthy that she does not cite a single case that held that the requirement of MCL 600.2912d(1)(d) to state "[t]he *manner* in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice" can be satisfied by a single word description such as "malpractice" or even by "a similarly succinct description such as 'the malpractice caused the death,' " *post* at 102. This is because no case has ever so held inasmuch as such a holding would be inconsistent with the explicit directive of MCL 600.2912d(1)(d) to state "[t]he *manner in which* the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice."

In this case, even the Court of Appeals dissent acknowledged that the AOMs were silent regarding how the defendants' actions or inactions caused Ligons's death. A statement answering how is precisely what MCL 600.2912d(1)(d) requires, and this case demonstrates the importance of that requirement. Ligons's colon was perforated by a doctor (who is not a defendant here) eight days before she went to the hospital. She then refused to be admitted to the hospital, only to come back a day later, when the perforated colon was discovered. With so many different parties and procedures involved, as well as Ligons's own medical history, plaintiff must state how defendants' alleged negligence in not diagnosing the perforated colon one day earlier was the proximate cause of Ligons's death. Plaintiff failed to do so, as required by MCL 600.2912d(1)(d); therefore, the AOMs were statutorily deficient.[51]

C. A PLAINTIFF MAY NOT AMEND A DEFECTIVE AFFIDAVIT OF MERIT

Plaintiff nonetheless argues that MCR 2.112, MCR 2.118, MCL 600.2301, and *Bush v Shabahang*,[52] permit retroactive amendment of defective AOMs. We are not

(Emphasis added.) Merely stating that "the malpractice caused the death" does not explain the *manner in which* the malpractice caused the death.

[51] Justice HATHAWAY argues that the statements contained in the NOI can satisfy the AOM requirements. See *post* at 102-103. This argument fails to appreciate, however, that MCL 600.2912d(1)(d) very clearly states that the AOM "*shall contain* a statement" regarding "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." (Emphasis added.) It does not state that either the NOI or the AOM shall contain such a statement; it states that the AOM *shall* contain such a statement. Therefore, whether the NOI contains such a statement is irrelevant to the question whether the AOM contains the statements required by MCL 600.2912d(1).

[52] *Bush*, 484 Mich 156.

persuaded that these authorities compel that conclusion, one that is directly contrary to the rules of *Scarsella* and *Kirkaldy*, which call for dismissal in the event of an absent or defective AOM.[53]

1. AN AFFIDAVIT OF MERIT IS NOT A "PLEADING" THAT MAY BE AMENDED UNDER THE APPLICABLE VERSION OF MCR 2.118

Plaintiff urges that amendment should be permitted under the version of MCR 2.118 in effect at the time this case was pending in the trial court.[54] MCR 2.118 governs amended and supplemental pleadings. Both the prior and current versions of MCR 2.118(A)(1) permit a party to "amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party . . . ."[55] MCR 2.118(A)(2) further provides that "[e]xcept as provided in subrule (A)(1), a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." Former MCR 2.118(D), which governed the relation back of amendments, provided, "An amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction,

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[53] Contrary to Justice HATHAWAY's contention, see *post* at 106-107, *Kirkaldy* is not significantly distinguishable from the instant case. *Kirkaldy* held that the appropriate remedy for a defective AOM is dismissal. The fact that the defects in the affidavits of merit are not identical does not change the fact that the appropriate remedy remains dismissal.

[54] As discussed later in this opinion, MCR 2.112 and MCR 2.118 were amended, effective May 1, 2010. 485 Mich cclxxv-cclxxvi (2010).

[55] This one-time, automatic ability to revise may be exercised "within 14 days after serving the pleading if it does not require a responsive pleading." MCR 2.118(A)(1).

or occurrence set forth, or attempted to be set forth, in the original pleading."[56]

By its terms, former MCR 2.118 applied only to a "pleading." MCR 2.110(A) defines "pleading" for purposes of the Michigan Court Rules restrictively to include "*only*: (1) a complaint, (2) a cross-claim, (3) a counterclaim, (4) a third-party complaint, (5) an answer to a complaint, cross-claim, counterclaim, or third-party complaint, and (6) a reply to an answer. *No other form of pleading is allowed*."[57] As with statutes, when a court rule "specifically defines a given term, that definition alone controls."[58] An AOM, even if required to be appended to a complaint, is not included in this restrictive definition of a "pleading." Plaintiff relies heavily on a statement in *Barnett v Hidalgo*,[59] which described an AOM as "part of the pleadings" in determining that an AOM is "generally admissible as an adoptive admission[.]" But plaintiff fails to appreciate the context in which the statement was made: describing a document as "part" of the pleadings when addressing an evidentiary issue does not turn the document into a pleading for purposes of MCR 2.118(D) if it does not meet the definition in MCR 2.110(A).[60] Indeed, elsewhere *Barnett*

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[56] Former MCR 2.118(D) (version effective January 1, 2001, through April 30, 2010, see 463 Mich at clvii [2000]; 485 Mich at cclxxvi [2010]).

[57] MCR 2.110(A) (emphasis added; formatting altered).

[58] *Haynes*, 477 Mich at 35.

[59] *Barnett v Hidalgo*, 478 Mich 151, 161; 732 NW2d 472 (2007).

[60] Further, the *Barnett* Court's conclusion that an AOM may be offered at trial as an admission was based on the following logic: an AOM is a "sworn statement" regarding the issues addressed and "by filing the affidavit of merit with the court, [a] plaintiff manifests 'an adoption or belief in its truth.' " *Barnett*, 478 Mich at 160-161, quoting MRE 801(d)(2)(B), which permits admission of "a statement of which the party has manifested an adoption or belief in its truth." *Barnett* also cited former MRPC 3.3(a)(4), which referred to a lawyer's general duty to

clearly referred to the AOM as distinct from the complaint, stating that AOMs "are required to accompany a complaint . . . ." *Id.* at 160. Under MCR 2.110(A)(1), for purposes of the court rules it is the "complaint" itself that constitutes a "pleading," not the complaint and any document accompanying it. *Barnett* neither held nor relied on the premise that an AOM is a pleading for purposes of the rule permitting amendment of pleadings, MCR 2.118.

Plaintiff also argues that the Court's opinion in *Scarsella* compels the conclusion that an AOM is a pleading. He stresses the *Scarsella* Court's holding that " 'the mere tendering of a complaint without the required affidavit of merit is insufficient to commence the lawsuit.' "[61] Then plaintiff notes that, pursuant to MCL 600.1901, which applies generally to all civil actions, "[a] civil action is commenced by filing a complaint with the court." And he similarly notes that the general civil complaint tolling statute cited in *Scarsella*, MCL 600.5856(a), permits tolling "[a]t the time the complaint is filed . . . ." Because *Scarsella* held that a medical malpractice action is not commenced—and tolling does not occur—if the complaint is not accompanied by an AOM, plaintiff reasons that, for *Scarsella* to be consistent with MCL 600.1901 and MCL 600.5856(a), an AOM must be "*part and parcel*" of the complaint.

But *Scarsella*, like *Barnett*, did not rule that an AOM is a complaint or is "part and parcel" of the complaint. Rather, the Court consistently referred to the complaint

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refrain from offering "evidence that the lawyer knows to be false." *Id.* at 161; see 488 Mich cxxix, cxxxiii (2010). It supported this logic, in turn, not by characterizing an AOM as a pleading, but by reference to other cases permitting the introduction of third-party affidavits—without regard to whether they were filed with the pleadings—as adoptive admissions. *Id.* at 161 n 4.

[61] *Scarsella*, 461 Mich at 549, quoting *Scarsella*, 232 Mich App at 64.

and AOM as distinct documents. For example, the Court noted that " 'medical malpractice plaintiffs must file *more than* a complaint; they "shall file *with the complaint* an affidavit of merit . . . ." ' "[62] Importantly, *Scarsella* clarified that commencement of a medical malpractice action is not governed solely by the general statutes applicable to civil suits. Rather, medical malpractice suits are governed in detail by specific statutes unique to this area of law. In contrast to the generic rule that a civil action may be commenced through the mere filing of a complaint, MCL 600.2912b(1) establishes that, generally, "a person shall not commence an action alleging medical malpractice . . . unless the person has given the [defendants] written notice under this section not less than 182 days before the action is commenced."[63] Similarly, as *Scarsella* held, pursuant to MCL 600.2912d(1) a medical malpractice claimant must file not just a complaint, but "shall file *with the complaint* an affidavit of merit . . . ."[64] A defendant, moreover, is not simply required to file an answer to the complaint, but must also file an affidavit of meritorious defense—the counterpart to a plaintiff's AOM—within 91 days after the plaintiff files an AOM.[65]

These specific statutes governing medical malpractice actions, which "appl[y] to the more narrow realm of

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[62] *Scarsella*, 461 Mich at 549, quoting *Scarsella*, 232 Mich App at 64, quoting MCL 600.2912d(1) (emphasis added).

[63] And see *Boodt*, 481 Mich at 562-563, which observed that a plaintiff "cannot commence an action before he or she files a notice of intent that contains all the information required under [MCL 600.2912b(4)]" and that, if the plaintiff fails to do so, a subsequently filed complaint and affidavit of merit do not toll the period of limitations.

[64] Emphasis added.

[65] MCL 600.2912e(1). Instead of answering, a medical malpractice defendant also has a unique alternative option to "file with the court an affidavit certifying that he or she was not involved, either directly or indirectly, in the occurrence alleged in the action." MCL 600.2912c(1).

circumstances," prevail over the more general rules applicable to all civil actions.[66] Accordingly, it does not necessarily follow that, simply because other civil plaintiffs may commence suit by filing a complaint, an AOM *is* a complaint—or is part and parcel of a complaint—particularly for purposes of applying the Michigan Court Rules.[67]

Permitting amendment of a deficient AOM also runs directly counter to the statutes governing medical malpractice suits, particularly MCL 600.2912d. By its terms, MCL 600.2912d requires that a plaintiff obtain a qualified expert willing to review the medical records and certify that the claim has merit because, in the expert's opinion, each defendant breached the applicable standard of practice or care, there were actions the defendant should have taken or omitted in order to comply with the standard, and the breach was the proximate cause of the injury alleged in the presuit notice.[68] Consistently with its purpose to certify merit at the outset of the case, MCL 600.2912d(1) directs that the plaintiff "shall file" the AOM "with the complaint." If the plaintiff is unable to comply with this mandate, the statute provides two alternatives for recourse: MCL 600.2912d(2) permits the court to grant an additional 28 days in which to file the AOM "[u]pon motion of a party for good cause shown," and MCL 600.2912d(3)

[66] *Miller v Allstate Ins Co*, 481 Mich 601, 613; 751 NW2d 463 (2008).

[67] Plaintiff also cites *Jackson v Detroit Med Ctr*, 278 Mich App 532, 543-544; 753 NW2d 635 (2008), in which the Court of Appeals held that the trial court had discretion to decide whether an AOM could be amended under MCR 2.118(A). The *Jackson* plaintiff sought to amend an AOM that was *sufficient* under MCL 600.2912d(1) in order to assert liability under new theories. *Id.* With regard to *deficient* AOMs such as those at issue here, *Jackson* reiterated that, under *Kirkaldy* and *Scarsella*, the proper remedy is dismissal. *Id.* at 543.

[68] See MCL 600.2912d(1); *Solowy*, 454 Mich at 228.

affords the plaintiff "91 days after the filing of the complaint" to file the AOM if the defendant failed "to allow access to medical records within the time period set forth in [MCL 600.2912b(6)]."

Accordingly, the statute clearly conveys that the AOM must be provided within the relevant time frames. For this reason, permitting a plaintiff to correct deficiencies in the AOM through amendment as a matter of course within 14 days after service of a responsive pleading, MCR 2.118(A)(1), and indefinitely thereafter by leave of the court or consent of the adverse party, MCR 2.118(A)(2), would directly conflict with the legislative remedies provided in MCL 600.2912d(2) and (3), which allow a plaintiff who is unable to submit a conforming AOM with the complaint an additional 28 or 91 days, respectively, to complete and submit the AOM. Just as the *Scarsella* Court reasoned in rejecting retroactive "amendment" of untimely AOMs under MCR 2.118, permitting amendment of a deficient AOM would similarly subvert the AOM statute by allowing plaintiffs to routinely file complaints without conforming AOMs.[69]

Because permitting amendment of a defective AOM runs counter to the established statutes, court rules, and cases governing this area of law, we hold that a plaintiff may not amend a deficient AOM under the version of MCR 2.118 in effect during the pendency of this suit in the trial court.

2. MCL 600.2301 AND *BUSH v SHABAHANG* DO NOT AUTHORIZE AMENDMENT OF AN AFFIDAVIT OF MERIT

Next, plaintiff urges that we permit amendment of deficient AOMs under MCL 600.2301 and this Court's

[69] Compare *Scarsella*, 461 Mich at 550.

2009 decision in *Bush*.[70] But retroactive amendment of a deficient AOM has never been authorized under any court rule or statute, and as explained in part III(C)(1), would actually be contrary to the specific statutory scheme governing medical malpractice actions. This Court has long recognized that an attachment to a complaint or pleading is neither a "process" nor a "proceeding" under MCL 600.2301.[71] In fact, this Court noted in 1892 that there was no statutory support for

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[70] *Bush*, 484 Mich 156.

[71] Even if an affidavit of merit is part of a "proceeding" and subject to amendment under MCL 600.2301, *Bush* held that MCL 600.2301 requires an initial good-faith attempt to comply with the statutory requirements. Plaintiff did not do so in this case. In *Bush*, 484 Mich at 183-184, the Court held that the defendant's response to the plaintiff's NOI, stating " 'the current medical condition of Gary Bush was not in any way caused or contributed by the activities of Dr. Shabahang,' " was "utterly lacking in a good-faith attempt to comply." The defendant's statement demonstrated a lack of a good-faith attempt to comply because it merely stated in a conclusory fashion that the defendant's alleged negligence did not cause the plaintiff's injury. Indeed, every justice in *Bush* agreed on this point. See *id*. at 182-184; *id*. at 205-206 (MARKMAN, J., dissenting). Similarly, plaintiff's statement here demonstrated a lack of a good-faith attempt to comply because it merely stated in a conclusory fashion that defendants' negligence caused Ligons's death. It did not at all explain the manner in which defendants' negligence caused her death. Therefore, we respectfully disagree with Justice CAVANAGH's assertion that "the contents of the AOM do not evidence an utter lack of a good-faith attempt to comply with the proximate-causation requirement of MCL 600.2912d(1)(d)." *Post* at 95.

Furthermore, contrary to Justice CAVANAGH's contention, "defendant's substantial rights would be affected by permitting" MCL 600.2301 to cure what he refers to as the "technical defect in the AOM . . . ." *Post* at 96-97. MCL 600.2912d(1)(d) very clearly states that a medical malpractice plaintiff "*shall* file with the complaint an affidavit of merit" and that this affidavit "*shall* contain a statement" regarding "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." (Emphasis added.) Allowing a medical malpractice plaintiff to proceed in an action against a defendant even though the plaintiff did not provide such an affidavit affects the defendant's substantial right to have the law mean what it says.

allowing amendment of an affidavit on the ground that it was a process or a proceeding:

> There is no statute now in force permitting amendments to attachment affidavits, and such amendments have never been deemed admissible under [How Stat] 7631, which provides that "the court in which any action shall be pending shall have power to amend any process, pleading, or proceeding in such action, either in form or substance, for the furtherance of justice.[72]

The *Bush* Court's application of MCL 600.2301 to a medical malpractice NOI was rooted in the Legislature's 2004 amendment of MCL 600.5856(c), the notice-tolling statute, and does not apply to AOMs. Unlike NOIs, which give notice to defendants, AOMs are meant to weed out frivolous cases before they are ever filed. Applying *Bush* beyond the scope of the 2004 amendment of MCL 600.5856(c) and NOIs to AOMs would be an unwarranted expansion of its focus on the notice-tolling statute, would free the opinion from its statutory moorings, would frustrate the purpose of the AOM requirement, and would create unnecessary conflict with existing caselaw, such as *Kirkaldy*, which *Bush* did not overrule. We therefore decline to apply the rationale of *Bush* beyond its limited statutory focus.

3. THE NEW VERSIONS OF MCR 2.112 AND MCR 2.118 ARE NOT APPLICABLE

Finally, we address plaintiff's argument that he should now be permitted to amend his AOMs in light of the 2010 amendments of MCR 2.112 and MCR 2.118. In addition to mandating that a party challenge an allegedly defective AOM or affidavit of meritorious defense within 63 days of service, MCR 2.112(L)(2)(b) now

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[72] *Freer v White*, 91 Mich 74, 76; 51 NW 807 (1892).

states, "An affidavit of merit or meritorious defense may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301." In turn, MCR 2.118(D) now states, in relevant part, "In a medical malpractice action, an amendment of an affidavit of merit or affidavit of meritorious defense relates back to the date of the original filing of the affidavit."[73] The February 16, 2010, order adopting the amendments unequivocally stated that they became effective May 1, 2010, long after the complaint and the AOMs in this case were filed and, indeed, after the Court of Appeals resolved the case and plaintiff's application for leave to appeal was filed in this Court.[74] Because this Court explicitly ordered that the amended rules have prospective effect, we will not apply the rules retroactively at plaintiff's request. Moreover, as defendants argue, full retroactive application of the rules is impossible at this late stage and would result in prejudice to defendants; defendants cannot go back in time and comply with the new requirement that, to challenge an AOM at all, they must do so within 63 days of service. Accordingly, retroactive application of the rules would render defendants' challenge to the AOMs ineffective and afford them no opportunity to renew their arguments concerning their deficiency or to oppose any motion plaintiff might bring for amendment at the court's discretion under MCR 2.118(A)(2). A newly adopted court rule will not be applied to pending actions if a "party acts, or fails to act, in reliance on the prior rules and the party's action or inaction has consequences under the new rules that were not present under the old rules."[75] In other words, amended court rules will not apply retroactively

[73] The substance of the amendments is not at issue here.

[74] See *Ligons*, 486 Mich at 978 (CORRIGAN, J., dissenting in part).

[75] *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332, 337; 602 NW2d 596 (1999) (quotation marks and citation omitted).

if compliance with the newly prescribed time limits is impossible.[76] We therefore decline to apply the amended versions of MCR 2.112 and MCR 2.118 here.

D. DISMISSAL WITH PREJUDICE WAS REQUIRED

Plaintiff's case was dismissed with prejudice because the two-year statutory limitations period provided in MCL 600.5805(6) for his medical malpractice action expired before his AOMs were deemed defective; therefore, no tolling was available to him upon his filing the complaint under MCL 600.5856(a). The alleged malpractice by defendants occurred on January 22, 2002. Accordingly, the two-year limitations period expired on January 22, 2004. If the suit had been commenced before January 22, 2004, the limitations period would have been tolled when the complaint was filed with the accompanying AOMs. But no suit was filed within the limitations period, so no tolling was available.

Instead, plaintiff filed suit within the saving period afforded him under MCL 600.5852, which permits the personal representative of the decedent's estate to commence an action "at any time within 2 years after letters of authority are issued although the period of limitations has run" as long as commencement is "within 3 years after the period of limitations has run." Plaintiff was appointed personal representative on February 22, 2005.[77] He had until January 22, 2007—three years after the two-year period of limitations expired on January 22, 2004—in which to file suit during the saving period. He filed his complaint and AOMs on April 7, 2006. Although plaintiff filed suit during the saving period, because the limitations period had ex-

[76] See *Solosth v Pere Marquette R Co*, 255 Mich 62, 66; 237 NW 554 (1931).

[77] Plaintiff is the second personal representative of Ligons's estate.

pired, there was nothing left to toll under MCL 600.5856(a) when he filed the complaint even though it was accompanied by AOMs. For these reasons, the Court of Appeals correctly dismissed plaintiff's case with prejudice.

IV. CONCLUSION

Pursuant to the plain and controlling language of MCR 2.110(A), the applicable version of MCR 2.118, MCL 600.5856, MCL 600.2912d, and this Court's decisions in *Scarsella*, *Kirkaldy*, and *Waltz*, we hold that a defective AOM may not be retroactively amended and that the proper response to a defective AOM is dismissal. Although the timely filing of a defective AOM tolls the limitations period until a court finds the AOM defective, an AOM filed during a saving period after the limitations period has expired tolls nothing, as the limitations period has run and the saving period may not be tolled. In this case, because the limitations period had run before the complaint was filed, plaintiff cannot amend his defective AOMs retroactively. Given that the saving period has expired, plaintiff's case had to be dismissed with prejudice. The judgment of the Court of Appeals is affirmed.

YOUNG, C.J., and MARKMAN and MARY BETH KELLY, JJ., concurred with ZAHRA, J.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority's decision to affirm the Court of Appeals' judgment dismissing plaintiff's case with prejudice. In my view, MCL 600.2301 should apply when the contents of an affidavit of merit (AOM) are deficient. Accordingly, I would remand this case to the trial court for consideration under MCL 600.2301.

For the reasons stated in Justice MARILYN KELLY's dissent in *Roberts v Mecosta Co Gen Hosp (After Remand)*, 470 Mich 679, 702-714; 684 NW2d 711 (2004) (MARILYN KELLY, J., dissenting), I agree with Justice HATHAWAY's conclusion in this case that a heightened level of specificity in the contents of an AOM is not required. While Justice MARILYN KELLY's dissent examined MCL 600.2912b, addressing the contents of a notice of intent to sue (NOI), I believe that her analysis is persuasive as it relates to the AOM statute, MCL 600.2912d.

As the *Roberts* dissent explained, it is this Court's duty to determine the Legislature's intent, which begins with an examination of a statute's language. *Roberts*, 470 Mich at 705 (MARILYN KELLY, J., dissenting). Because the "Legislature knows what phrasing to use when it intends to require extensive detail," it is noteworthy that the Legislature did not "explicitly mandate such specificity" in the AOM context. *Id.* at 709. Specifically, like the NOI statute, MCL 600.2912d only requires a "statement" regarding the alleged manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.[1] Thus, as Justice HATHAWAY notes, the AOM statute does

[1] MCL 600.2912d(1) states in relevant part:

> [T]he plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness under [MCL 600.2169]. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
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> * * *

not expressly require a heightened level of specificity, as do other statutes. See *Roberts*, 470 Mich at 708-709 (MARILYN KELLY, J., dissenting) (examining other statutes that require "detailed," "complete," or "full" statements, or that require statements made "with specificity"). Further, because the purpose of the AOM statute is to deter frivolous medical malpractice claims by requiring a certification that a claim is valid, a general assertion of the items required by the AOM statute is sufficient to lend professional credence to the claim's legitimacy and thus is likely sufficient to meet the statute's apparent intent. See *id*. at 707-708. Therefore, I agree with Justice HATHAWAY that a high level of specificity is not required in the AOM context.

Nevertheless, assuming arguendo that the AOM[2] in this case was deficient, I believe that MCL 600.2301[3] should apply to allow a cure of the alleged deficiency within the AOM. To begin with, applying MCL 600.2301 would not conflict with MCL 600.2912d, when the latter is read as a whole. Indeed, as recognized by Justice HATHAWAY, the AOM statute does not expressly provide a penalty for deficiencies within the contents of an AOM. And, notably, the allowances of additional time to

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> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

[2] Although plaintiff filed two AOMs in this case, because I believe that, at a minimum, MCL 600.2301 would permit the alleged defects in Dr. George Sternbach's AOM to be cured, I will refer to AOM in the singular.

[3] MCL 600.2301 provides:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

file an AOM in MCL 600.2912d(2) and (3) do not explicitly preclude amending or disregarding defects within the contents of an AOM.[4] Instead, those provisions merely provide a plaintiff additional time in which to file the initial AOM and, thus, do not address curing an arguably defective AOM. And while I continue to adhere to my position in *Kirkaldy v Rim*, 478 Mich 581, 586-587; 734 NW2d 201 (2007) (CAVANAGH, J., concurring), as Justice HATHAWAY suggests, allowing a defect within an AOM to be cured under MCL 600.2301 would simply provide an alternative remedy to that of *Kirkaldy*, in which the majority opined that the remedy for a successful challenge to a deficient AOM is dismissal without prejudice, *id*. at 586 (majority opinion). Accordingly, I believe that MCL 600.2301 should apply.[5]

Notably, the aim of MCL 600.2301 is to " ' "abolish technical errors in proceedings and to have cases disposed of as nearly as possible in accordance with the substantial rights of the parties." ' " *Boodt v Borgess Med Ctr*, 481 Mich 558, 569; 751 NW2d 44 (2008) (CAVANAGH, J., dissenting), quoting *Gratiot Lumber &*

[4] MCL 600.2912d provides, in relevant part:

> (2) Upon motion of a party for good cause shown, the court in which the complaint is filed may grant the plaintiff or, if the plaintiff is represented by an attorney, the plaintiff's attorney an additional 28 days in which to file the affidavit required under subsection (1).
>
> (3) If the defendant in an action alleging medical malpractice fails to allow access to medical records within the time period set forth in [MCL 600.2912b(6)], the affidavit required under subsection (1) may be filed within 91 days after the filing of the complaint.

[5] I disagree with the majority in this case that *Kirkaldy* provides the sole remedy for a defective AOM, given my belief that MCL 600.2301 provides an alternative remedy to the one posed by the majority in *Kirkaldy*, which, notably, did not cite or address the merits of applying MCL 600.2301.

Coal Co v Lubinski, 309 Mich 662, 668-669; 16 NW2d 112 (1944). And, by its terms, MCL 600.2301 applies to any "process" or "proceeding" before a court, allowing amendment, in either form or substance, at "any time" before judgment is rendered. See, also, *Bush v Shabahang*, 484 Mich 156, 176; 772 NW2d 272 (2009).

In this case, judgment had not yet been entered and, in my view, an AOM is part and parcel of a medical-malpractice "proceeding," given that it must be filed with the medical-malpractice complaint. See Black's Law Dictionary (9th ed) (defining "proceeding" as including "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment"; "[a]ny procedural means for seeking redress from a tribunal or agency"; and "[a]n act or step that is part of a larger action"); see, also, *Bush*, 484 Mich at 176-177; *Boodt*, 481 Mich at 568 n 6 (CAVANAGH, J., dissenting).[6] Further,

[6] As I have recognized in the past, this Court has previously applied MCL 600.2301 or its predecessors to allow amendment of documents that fall under the category of a process or proceeding. See *Boodt*, 481 Mich at 567-572 (CAVANAGH, J., dissenting); *Bush*, 484 Mich at 177 n 38. For this reason I disagree with the majority's suggestion that this Court has "long recognized" that an AOM cannot be amended under MCL 600.2301. Indeed, the only case that the majority cites for this position is *Freer v White*, 91 Mich 74; 51 NW 807 (1892). Yet *Freer* did not cite any Michigan authority for its assertion that amendments to "attachment affidavits" "have never been deemed admissible" under a predecessor of MCL 600.2301. *Id*. at 76. More importantly, however, *Freer* did not address the statute at issue in this case. Instead, *Freer* involved an "*attachment* affidavit" in an attachment proceeding. *Id*. (emphasis added). See, generally, MCR 3.103 (explaining the process for seeking a writ of attachment). Thus, because *Freer* involved an attachment proceeding, its statements regarding the applicability of the predecessor of MCL 600.2301 it discussed, which, by its terms, only expressly involved attachment affidavits, should not be read as applying to all affidavits generally, especially when this Court has held that statutes such as the predecessors of MCL 600.2301 should be "liberally construed." See *Beecher v Wayne Circuit Judges*, 70 Mich 363, 367; 38 NW 322 (1888).

because MCL 600.2301 permits amendment "either in form or substance," amending the substance of an AOM to more clearly state the manner in which the breach of the standard of practice or care was the proximate cause of the injury is proper. See *Boodt*, 481 Mich at 569 (CAVANAGH J., dissenting); *Bush*, 484 Mich at 177 (recognizing that MCL 600.2301 allows for amendment of errors in form or substance).

Also, permitting amendment of a defective AOM would be "for the furtherance of justice," consistent with MCL 600.2301. As I explained in *Boodt*, justice is furthered by applying MCL 600.2301 in a case in which a statute operates as a "terminal trap" for the unwary when as here, defendants seek to avoid litigation of a potentially meritorious claim on the basis of a technical defect in an otherwise sufficient[7] and timely filed AOM. See *Boodt*, 481 Mich at 569 (CAVANAGH, J., dissenting). Additionally, when plaintiff's AOM is read as a whole, the contents of the AOM do not evidence an utter lack of a good-faith attempt to comply with the proximate-causation requirement of MCL 600.2912d(1)(d).[8] Accordingly, even if plaintiff's AOM were deficient, allowing the alleged defect to be cured under MCL 600.2301 would be in the furtherance of justice. See *Bush*, 484 Mich at 180-181.

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[7] Notably, in this case, only the AOM's statement regarding the manner in which the breach of the standard of practice or care was the proximate cause of the injury is at issue.

[8] Instead, the AOM in this case indicated that, in order to comply with the applicable standard of care, defendants should have admitted the decedent to the hospital on January 22, 2002, and obtained the appropriate consultations on that date and that, as a direct and proximate cause of defendants' acts and omissions, the decedent died. Compare, *Bush*, 484 Mich at 178, 180 n 43, 182-183 (concluding that the defendant's one-page blanket denial provided an example of a failure to demonstrate a good-faith attempt to comply with the content requirements of the NOI statute).

Further, I do not believe that defendants' substantial rights would be affected by permitting MCL 600.2301 to cure the alleged defect in plaintiff's AOM. See *Bush*, 484 Mich at 177-178. Unlike an NOI, which is aimed at providing notice of a claim to a defendant and promoting settlement, see *Roberts*, 470 Mich at 707-708 (MARILYN KELLY, J., dissenting), and *Bush*, 484 Mich at 174, the purpose of an AOM is to demonstrate that a valid claim exists. Thus, because an AOM is not intended to provide details in an effort to give notice of an impending claim and to promote settlement, a stronger justification likely exists for allowing a minor defect in the contents of an AOM to be cured. Stated another way, despite a technical defect in the AOM, a defendant would certainly be apprised of the fact that a health-care professional who had reviewed the plaintiff's medical records believed that there was a valid claim, furthering the intent of the AOM statute. And although a defendant is required to file an answer to a plaintiff's complaint within 21 days after an AOM is filed, a defendant's affidavit of meritorious defense is not dependent on the contents of a plaintiff's AOM. See MCL 600.2912e; cf. MCL 600.2912b(7) (requiring a defendant to submit a written response to a plaintiff's NOI).[9] Thus, I would not hastily conclude that a defendant's substantial rights would be affected by permit-

[9] In my view, any claim of prejudice to defendants' rights rings hollow in this case. Like the AOM statute, the NOI statute similarly requires a statement regarding proximate causation. MCL 600.2912b(4)(e). In this case, defendants cannot legitimately claim that they would be unfairly prejudiced by allowing the alleged defects in the AOM to be cured, given that plaintiff's statement regarding proximate causation in the supplemental NOI was deemed sufficient by the Court of Appeals and defendants were served with plaintiff's supplemental NOI before plaintiff filed the complaint and AOM.

ting any alleged defects to be cured under MCL 600.2301.[10]

Accordingly, even assuming arguendo that the AOM was deficient in this case, because I believe that the alleged defect can be cured pursuant to MCL 600.2301, I would remand this case to the trial court for consideration under that statute.

MARILYN KELLY, J., concurred with CAVANAGH, J.

HATHAWAY, J. (*dissenting*). I respectfully dissent from the majority's decision to dismiss plaintiff's medical malpractice action with prejudice. The majority holds that plaintiff's affidavits of merit (AOMs) were defective, that they cannot be amended pursuant to MCL 600.2301, and that plaintiff's complaint must therefore be dismissed with prejudice. The majority's conclusions are erroneous because plaintiff's AOMs were not defective and even in cases involving AOMs with content defects, MCL 600.2301 clearly provides relief. Moreover, the plain language of the AOM statute, MCL 600.2912d(1), does not contemplate, let alone require, that a plaintiff's complaint be dismissed with prejudice for defects contained in an AOM. Thus, the majority's decision ignores the plain language of the relevant statutes. The majority abandons the rule of law and reaches its result by rewriting the applicable statutes. Accordingly, I dissent.

I. THE REQUIREMENTS OF THE AOM STATUTE

At issue is whether plaintiff's AOMs met the require-

[10] For the reasons stated in this dissent, I respectfully disagree with the majority's conclusion that permitting a cure would affect defendants' substantial rights. See, also, *Bush*, 484 Mich at 178. Further, I respectfully disagree with the majority's suggestion that permitting a trial court to cure a technical defect within an AOM is erroneous. In my view, the majority's opinion effectively renders MCL 600.2301 nugatory.

ments of MCL 600.2912d(1), the AOM statute. To correctly resolve this issue, we must first examine the language of the AOM statute and determine its correct interpretation. In examining this statute, we follow the established rules of statutory construction. The purpose of statutory construction is to discern and give effect to the intent of the Legislature.[1] In doing so, we first look to the actual language of the statute.[2] If a statute is clear and unambiguous, it must be enforced as written and no further judicial construction is allowed.[3] Simply stated, we must avoid a construction that would render any part of the statute nugatory,[4] and similarly, we are "not free to add language to a statute or to interpret a statute on the basis of this Court's own sense of how the statute should have been written."[5] Further, a statute must be read as a whole,[6] and while individual words and phrases are important, the words and phrases should be read in the context of the entire legislative scheme.[7]

MCL 600.2912d, the AOM statute, provides in pertinent part:

> (1) Subject to subsection (2), the plaintiff in an action alleging medical malpractice or, if the plaintiff is represented by an attorney, the plaintiff's attorney shall file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney reasonably be-

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[1] *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[2] *Potter*, 484 Mich at 410.

[3] *Sun Valley*, 460 Mich at 236.

[4] *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009), citing *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

[5] *Kirkaldy v Rim*, 478 Mich 581, 587; 734 NW2d 201 (2007) (CAVANAGH, J., concurring).

[6] See *Sun Valley*, 460 Mich at 237.

[7] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

> lieves meets the requirements for an expert witness under [MCL 600.2169]. The affidavit of merit shall certify that the health professional has reviewed the notice and all medical records supplied to him or her by the plaintiff's attorney concerning the allegations contained in the notice and shall contain a statement of each of the following:
>
> (a) The applicable standard of practice or care.
>
> (b) The health professional's opinion that the applicable standard of practice or care was breached by the health professional or health facility receiving the notice.
>
> (c) The actions that should have been taken or omitted by the health professional or health facility in order to have complied with the applicable standard of practice or care.
>
> (d) The manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice.

The majority focuses on the requirements of subdivision (d), which states that the AOM shall contain a statement of "[t]he manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." In this case, plaintiff submitted two separate AOMs.[8] The majority holds that these AOMs were deficient because they "failed to provide *any* statement of the manner in which the breach of the standard of care was the proximate cause of the injury alleged."[9] This conclusion is disingenuous because the plaintiff's AOMs *did contain statements*

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[8] Plaintiff's AOM containing a statement from Dr. Fred Thomas provided in pertinent part that "[i]t is my opinion that had the defendants admitted the patient to the hospital on January 22, 2002, and obtained the appropriate consults on January 22, 2002, as outlined in Dr. Sternbach's affidavit that Edris Ligons would not have died." Plaintiff's AOM containing a statement from Dr. George Sternbach provided in pertinent part that "[a]s a direct and proximate cause of the imprudent acts and omission committed by the individuals identified herein, Edris Ligons, died."

[9] *Ante* at 77 (emphasis added).

regarding causation. The statements were just not made to the level of exacting detail that the majority asserts is required by the statute. However, the majority's interpretation of what is required by MCL 600.2912d, the AOM statute, is erroneous.

In analyzing the AOM statute, we must be mindful that the Michigan Legislature has enacted many statutes requiring that a party detail certain facts or elements of a claim with varying levels of heightened specificity. For example, the Legislature used the phrase "with specificity" in MCL 333.17015(10), MCL 333.22231(4), and MCL 769.1a(8). The phrase "stating specifically" was used in MCL 38.416 and MCL 500.8133(3). The Legislature mandated in MCL 38.14, MCL 125.1510(1), MCL 408.1027(2)(b), MCL 462.319(1)(a), MCL 600.557b(2), and MCL 600.6461(2) that a "detailed statement" be made; required a "full statement" in MCL 224.25, MCL 491.920(3), and MCL 500.424(2); required a "complete statement" in MCL 14.283(b) and MCL 462.2(2); and required a "full and complete statement" in MCL 247.172, MCL 324.51904, and MCL 390.758.

The Legislature chose *not* to incorporate any of these phrases heightening the level of specificity in the AOM statute. If the Legislature had chosen to incorporate such qualifying language in MCL 600.2912d(1), then the majority might have a basis for its conclusion. However, MCL 600.2912d(1) is *silent* concerning the level of specificity with which the information in an AOM must be conveyed. Nothing in the plain language of this statute mandates the heightened level of specificity that the majority demands, and this Court is not free to add words or phrases to a statute. Thus, the requirement that the AOM "shall contain a statement

of each of the following" simply means what it says.[10] The statute requires that "*a statement*" must be made, not a "detailed statement," "a complete statement," or a "full explanatory statement."

Moreover, the majority distorts the word "manner" as used in MCL 600.2912d(1)(d).[11] The majority opines that the word "manner" requires a detailed statement of "how" the breach caused the injury:

> We have often said that it is insufficient to simply state the result when required to state the manner in which there was a breach: The answer to "*How* was the standard of care breached?" is never "The standard of care was breached." *Similarly, answering the question "How was the breach the proximate cause of the injury?" requires more than "The breach caused the injury."*[12]

However, this conclusion is inconsistent with how the word "manner" has been interpreted in other statutes such as MCL 28.258(12)(b), MCL 52.202(1), and MCL 52.205. Our courts have consistently interpreted the word "manner" as used in relation to those statutes as allowing for a single word description such as "homicide," "suicide," or "accident." In *People v Williams*, the Court of Appeals wrote:

> Over the next two days Ashton's condition continually deteriorated. Ashton died on November 10, 2003. An autopsy revealed that the cause of death was loss of consciousness caused by brain swelling. The Medical Examiner determined that Ashton had been violently shaken, causing his head to snap back and forth. The Medical Examiner concluded that the *manner* of death was homicide.[13]

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[10] MCL 600.2912d(1).

[11] MCL 600.2912d(1)(d) states, "The *manner* in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." (Emphasis added.)

[12] *Ante* at 77-78 (second emphasis added).

[13] *People v Williams*, unpublished opinion per curiam of the Court of Appeals, issued November 29, 2005 (Docket No. 256123), p 2.

See also, *Maiden v Rozwood*, 461 Mich 109, 115; 597 NW2d 817 (1999) ("[T]he 'manner of death was an accident.' ") (citation omitted); *People v Bailey*, 451 Mich 657, 664; 549 NW2d 325 (1996) (" 'The manner of death is homicide.' ") (citation omitted); *People v Schmitt*, unpublished opinion per curiam of the Court of Appeals, issued July 31, 2007 (Docket No. 264176), p 2 (ZAHRA, P.J., dissenting) ("The medical examiner determined the manner of Richard's death to be a homicide . . . ."), rev'd 480 Mich 963 (2007); and *People v Small*, unpublished opinion per curiam of the Court of Appeals, issued December 28, 1999 (Docket No. 205544), p 1 ("The assistant medical examiner testified that the cause of death was multiple gunshot wounds and that manner of death was homicide.").

Thus the use of the word "manner" in the AOM statute does not mandate a detailed description of how the breach caused the injury; rather the manner in which the breach was the proximate cause of the injury can be set forth in a similarly succinct description such as "the malpractice caused the death" or "the breaches of the standard of care caused the death," or "the death was caused by the breaches of the standard of care." Thus, all that MCL 600.2912d(1)(d) requires is a statement that the breach of the standard of care caused the result. To require the parties to provide further description creates a requirement not found in the language of the statute.

Moreover, the majority's ruling transforms an AOM into something that it is not. The AOM statute is one part of a larger statutory scheme for malpractice claims, and it must be read in the context of that larger legislative scheme. As set forth by the clear language of MCL 600.2912d(1), an AOM is designed only to act as certification that the claim is supported by the opinion

of a qualified expert. The statute states that the plaintiff "shall file . . . an affidavit of merit signed by *a health professional who the plaintiff's attorney reasonably believes meets the requirements for an expert witness . . . . The affidavit of merit shall certify that the health professional has reviewed the notice* [*of intent*] . . . concerning the allegations contained in the notice . . . ."[14] Thus, an AOM is intended to function as a *certification* that the allegations contained within the notice of intent (NOI) are meritorious. An AOM is filed with the complaint and is not the notice pleading. The NOI is the notice pleading. The AOM serves as certification that the allegations of the claim are meritorious, and its *only* role is to deter the filing of unsupported claims. By failing to read the AOM statute in its entirety and in the context of the malpractice statutory scheme, the majority simply misconstrues the statute.

The majority compounds its error by focusing solely on the statements made in the AOM, rather than reading the AOM in concert with the NOI, as contemplated by the AOM statute. The AOM statute requires that "[t]he affidavit of merit shall certify that *the health professional has reviewed the notice* and all medical records supplied to him or her by the plaintiff's attorney *concerning the allegations contained in the notice* . . . ."[15] As evidenced by this plain language, an AOM is not a standalone document. Rather, it is to be *read in concert* with the NOI. The statute requires that the expert review the NOI and certify that he or she supports allegations contained therein, and while the statute requires the expert to make a statement on proximate causation, it does not require that the expert repeat the contents of the NOI in the AOM.

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[14] MCL 600.2912d(1) (emphasis added).

[15] *Id.* (emphasis added).

II. THE SUFFICIENCY OF PLAINTIFF'S AFFIDAVITS OF MERIT

In this case, the NOI set forth in detail the nature of the claim and how the plaintiff's decedent, Edris Ligons, died. From the pleadings, plaintiff's allegations appear to be relatively straightforward and uncomplicated. The NOI and AOMs alleged that professional negligence occurred during a visit to defendant Crittenton Hospital's emergency room, where Ligons was seen by defendant David Bruce Bauer, M.D. Plaintiff claimed that Ligons had suffered a perforation of her colon during a recently performed colonoscopy and that she developed sepsis as a result of the perforation. Ligons went to the emergency room for follow-up treatment, and plaintiff claimed that Dr. Bauer failed to admit her to the hospital for the proper diagnostic testing and treatment. Plaintiff further claimed that this improper treatment allowed the sepsis to become overwhelming, leading to multiple organ failure, causing Ligons's death. The NOI set forth the factual background of plaintiff's claim:

> Edris Ligons was a 54-year-old woman, with a history of colon polyps, with one atypical polyp found on a previous colonoscopy. She came to Crittenton Hospital for an outpatient follow-up colonoscopy on January 14, 2002. Dr. Tayeb noted during the procedure that the colon was very tortuous and pressure had to be applied to reach the cecum. The clinical diagnosis was diverticulosis and hemorrhoids.
>
> On January 22, 2002 Mrs. Ligons presented to the Emergency Department at Crittenton with a four-day history of vomiting, diarrhea, chills, and fever. She had a fever of 102.4. She had abdominal tenderness on examination. She had a [white blood cell count] of 15,400. An abdominal x-ray showed an abnormal gas pattern with mildly dilated small bowel loops, and paucity of gas or bowel content in the colon. The report indicated that this could reflect early or partial bowel obstruction. The radi-

> ologist specifically recommended progress views. She was treated for gastroenteritis and dehydration. She was given antibiotics and fluids. She was discharged within six hours.
>
> She went to Dr. Tayeb's office on the 23rd due to severe pain. She was immediately sent to the Emergency Department. Examination revealed changes consistent with peritonitis because of a perforated colon. She developed sepsis. Exploratory laparatomy revealed an extensive pelvic abscess, and surgical resection was not possible. Despite extensive medication, the sepsis that developed due to the perforated colon led to multiple organ failure and death on January 29, 2002.

Plaintiff's supplemental NOI further stated:

> As a direct and proximate result of the negligence and malpractice alleged above Edris Ligons experienced conscious pain and suffering and ultimately died due to the negligence. Specifically, had Dr. Bauer admitted the patient to the hospital on January 22, 2002 and had appropriate consults been obtained including surgery and [gastrointestinal] and had progress X-rays been obtained the patients [sic] peritonitis would have been diagnosed much earlier. The per[forated] colon would have been detected and surgery would have been performed much earlier. This would have avoided the overwhelming sepsis that led to the multi organ system failure and ultimately death.

The AOM signed by Dr. Fred Thomas certified that he had reviewed the NOI and all the medical records concerning the allegations contained in the notice and concluded, "It is my opinion that had the defendants admitted the patient to the hospital on January 22, 2002, and obtained the appropriate consults on January 22, 2002, as outlined in Dr. Sternbach's affidavit that Edris Ligons would not have died." The AOM signed by Dr. George Sternbach similarly certified his review and concluded, "As a direct and proximate cause of the imprudent acts and omission committed by the individuals identified herein, Edris Ligons, died."

While I do not opine on whether plaintiff would ultimately prevail on the merits, it is pure folly to suggest that these statements do not meet the requirements of MCL 600.2912d(1)(d). To reach such an erroneous conclusion, the majority effectively ignores the statements that the "per[forated] colon would have been detected and surgery would have been performed much earlier" and "[t]his would have avoided the overwhelming sepsis that led to the multi organ system failure and ultimately death." The majority further ignores the Dr. Thomas's certification that he had reviewed that statement and the supporting medical records and ignores his opinion that "had the defendants admitted the patient to the hospital on January 22, 2002, and obtained the appropriate consults on January 22, 2002, as outlined in Dr. Sternbach's affidavit that Edris Ligons would not have died."

The majority's conclusion that the contents of the NOI must be repeated in the AOM is at odds with the plain language of the statute. Plaintiff's AOMs met the requirements of MCL 600.2912d(1)(d).[16] The AOMs, when read in concert with the NOI, set forth a "statement" regarding the "manner in which the breach of the standard of practice or care was the proximate cause of the injury alleged in the notice." Nothing more is required by the statute. Thus, plaintiff's AOMs were not defective.

III. DISMISSAL OF A CASE INVOLVING AN AOM WITH CONTENT DEFECTS IS NOT REQUIRED BY *KIRKALDY*

The majority further errs by holding that if an AOM contains any defect, the only possible remedy is dis-

[16] This is not to suggest or imply that parties are not free to engage in repetition or that being repetitive renders an AOM defective. Parties may be repetitive; however, it is not required by the statute.

missal under *Kirkaldy v Rim*.[17] In so opining, the majority expands the ruling of *Kirkaldy* well beyond its facts and legal conclusion. In *Kirkaldy*, the plaintiff's AOM was found to be defective because it was not signed by an expert who met the requirements of the expert-witness statute, MCL 600.2169. The plaintiff in *Kirkaldy* was not seeking relief from a defect in content. Instead, the plaintiff sought the ability to replace an AOM, signed by an unqualified expert, with an entirely new AOM signed by a qualified expert. Thus, *Kirkaldy* addressed the ability to substitute the original AOM for one signed by an entirely different expert witness. Nothing in *Kirkaldy* addressed an AOM containing purported defects in content. Rather, the defect at issue in *Kirkaldy* was that the expert was not qualified to support the claim. Significantly, the plaintiff in *Kirkaldy* filed a second complaint accompanied by a new AOM signed by a qualified expert. The plaintiff requested that the original case be dismissed without prejudice so that she could pursue the second complaint. This Court simply granted one of the avenues of relief requested by the plaintiff when it dismissed the case without prejudice.

Kirkaldy decided the issue of whether filing the original complaint tolled the period of limitations under MCL 600.5856, and this Court held that even an AOM signed by an unqualified expert tolls the period of limitations. *Kirkaldy* did not address whether alternative remedies short of dismissal, such as amendment of an AOM, were available under MCL 600.2301. Thus, it is erroneous to state that dismissal is the only remedy for an AOM with content defects because this Court did not address that issue in *Kirkaldy*.

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[17] *Kirkaldy*, 478 Mich 581.

IV. DISMISSAL OF AN AOM WITH CONTENT DEFECTS IS CONTRARY TO THE AOM STATUTE

The proper starting point for identifying the required penalties and available remedies for AOMs with content defects is the language of the AOM statute itself. While MCL 600.2912d(1) mandates that a plaintiff shall not commence an action for medical malpractice without timely filing an AOM, *nothing* in the plain language of this statute requires or compels dismissal of the case for defects in the AOM. Despite the majority's contrary conclusion, the AOM statute makes no reference whatsoever to a mandatory dismissal penalty in the event of a defect. Instead, the statute is *silent* regarding the consequences of filing an AOM that contains content defects. Thus, we must determine whether mandatory dismissal with prejudice was the intent of the Legislature when it enacted MCL 600.2912d.

The legislative history of the AOM statute reveals that the Legislature did not intend for a defect in an AOM to be grounds for dismissal with prejudice. The clearest indicator of this intent is the Legislature's complete rejection of a "mandatory dismissal with prejudice" clause contained in the original draft of the legislation. The AOM statute was originally introduced as part of Senate Bill No. 270 on January 28, 1993. AOMs (referred to as "certificate[s]" in SB 270 as introduced) were addressed in proposed § 2912d. Proposed § 2912d contained a mandatory dismissal penalty. The bill as introduced linked the NOI and the AOM together. It also provided for dismissal of claims without the benefit of tolling afforded in MCL 600.5856, which in essence would have resulted in a dismissal with prejudice. Section 2912d as introduced stated:

> (1) A person shall not commence an action alleging medical malpractice unless the complaint is accompanied

> by the certificate signed by the person or, if the person is represented by an attorney, by the attorney reflecting that the person has complied with section 2912f [concerning NOIs]. *If the complaint is not accompanied by the certificate required under this subsection, the complaint does not toll the statute of limitations as provided in section 5856(1).*
>
> (2) Except as otherwise provided in this subsection, in an action alleging medical malpractice, *the court shall dismiss a claim not included in the notice required under section 2912f*. [Emphasis added; formatting altered from strikethrough/insert format to show language as proposed.]

Significantly, while AOMs and NOIs remained linked in the version of the bill actually adopted, the penalty provisions did not survive. There simply were not sufficient votes in the Legislature to enact a statute with such harsh penalties. This unequivocally demonstrates that mandatory dismissal was not the will of the Legislature. Michigan law makes clear that "[w]here the Legislature has considered certain language and rejected it in favor of other language, the resulting statutory language should not be held to explicitly authorize what the Legislature explicitly rejected."[18] Because the Legislature specifically omitted proposed dismissal language from the enrolled bill, it is unreasonable to conclude that the Legislature intended for courts to reinsert dismissal as the only permissible

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[18] *In re MCI Telecom Complaint*, 460 Mich 396, 415; 596 NW2d 164 (1999); see also *Univ Med Affiliates, PC v Wayne Co Executive*, 142 Mich App 135, 140; 369 NW2d 277 (1985) (holding that the legislative history of a statute may be considered, and if it can be shown that certain language was affirmatively rejected, the court should not give the statute a construction that the Legislature plainly refused to give it); *Nation v WDE Electric Co*, 454 Mich 489, 492-493, 495; 563 NW2d 233 (1997); *Miller v State Farm Mut Auto Ins Co*, 410 Mich 538, 566; 302 NW2d 537 (1981); and *People v Adamowski*, 340 Mich 422, 429; 65 NW2d 753 (1954).

remedy. The majority's interpretation of the phrase "shall contain a statement" as meaning "shall dismiss the case if there is a possible defect no matter how minor" is misguided.[19]

V. CONTENT DEFECTS IN AN AOM MAY BE CORRECTED

The AOMs in this case were not defective. However, even in cases involving AOMs with content defects, a party who files a defective AOM is entitled to seek relief. The first question is whether a plaintiff is entitled to relief under the former version of MCR 2.118. The majority claims that a plaintiff whose case was pending while the former version of MCR 2.118 was in effect[20] is not entitled to relief under the former rule because an AOM is not a pleading. To reach this conclusion the majority disavows the holding in *Barnett v Hidalgo*, 478 Mich 151, 161; 732 NW2d 472 (2007), that an AOM is part of a pleading and, therefore, admissible as substantive evidence at trial because it constitutes an admission by a party opponent. However, now the majority claims that because *Barnett* held that an AOM is only

[19] It is ironic that the Legislature refused to enact the most severe penalty, dismissal with prejudice, for a complete failure to file an AOM, yet here, the majority adopts this severe penalty for purported minor content defects.

[20] On February 16, 2010, this Court amended the court rules to make it clear that AOMs may be amended. Specifically, MCR 2.112(L)(2)(b) as amended now provides in pertinent part that "[a]n affidavit of merit or meritorious defense may be amended in accordance with the terms and conditions set forth in MCR 2.118 and MCL 600.2301." The majority's decision to preclude use of the amended rules conflicts with the general rule that " 'the norm is to apply the newly adopted court rules to pending actions unless there is reason to continue applying the old rules.' " *Reitmeyer v Schultz Equip & Parts Co, Inc*, 237 Mich App 332, 337; 602 NW2d 596 (1999), quoting *Davis v O'Brien*, 152 Mich App 495, 500; 393 NW2d 914 (1986); see also *People v Jackson*, 465 Mich 390; 633 NW2d 825 (2001); 1 Longhofer, Michigan Court Rules Practice (5th ed), §§ 1102.1 and 1102.2, pp 3-4.

"part of the pleadings,"[21] an AOM is not a "pleading" subject to amendment under MCR 2.118. This distinction is dubious at best, as nothing in former MCR 2.118 stated or suggested that a pleading can be amended but a part of it cannot.

Regardless of whether relief is available under the former court rule, the majority completely disregards MCL 600.2301. Once again, this Court must turn to the actual language of the statute. MCL 600.2301 contains two clear and unambiguous provisions:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

The plain language of this statute imposes a duty that cannot be ignored on all courts of this state. It requires that "[t]he court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties." This is not a discretionary provision. It is a legislative mandate that this Court must follow. Unless substantial rights are affected, the court *shall* disregard any error or defect at every stage of the action or proceeding. This provision applies to all actions or proceedings. Thus, even if we were to accept the majority's erroneous conclusion that an AOM is not a pleading, an AOM is nevertheless part of the "action" or "proceeding." Clearly, the failure to repeat statements already made cannot be characterized as affecting a substantial right. According to the plain language of the

[21] *Barnett*, 478 Mich at 161.

statute, this Court must disregard technical defects, such as the ones the majority claims are in plaintiff's AOMs. By failing to do so, the majority ignores a clear and direct mandate imposed on this Court by the Legislature.

Moreover, even in instances in which an AOM contains more substantial defects or substantial rights might be affected, trial courts still have discretion under MCL 600.2301 to afford relief by way of amendment when justice so requires. MCL 600.2301 states that "[t]he court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just . . . ." MCL 600.2301 clearly provides for amendment of more than just pleadings. It allows for amendments of "*any* process, pleading or proceeding." An AOM is without question part of the process or proceeding. Thus, an AOM is a document that courts have the power to amend.

The majority claims it can disregard the plain language of MCL 600.2301 by asserting that *Freer v White*, 91 Mich 74, 76; 51 NW 807 (1892), represents the long-established law in Michigan that amendment of an affidavit is prohibited. However, the majority's reliance on *Freer* (discussing "attachment" affidavits used in debtor-creditor disputes in the 1800s) is misguided.[22] In *Emerson v Detroit Steel & Spring Co*, 100 Mich 127, 132; 58 NW 659 (1894), this Court limited the holding in *Freer* to its facts and recognized that *Freer* had not overruled *Barber v Smith*, 41 Mich 138; 1 NW 992 (1879), which had previously allowed for amendments

[22] *Freer* has not been cited as authority by any court in this state since 1907.

to attachment affidavits.[23] Accordingly, *Freer* does not, as the majority claims, support its decision to ignore the plain language of MCL 600.2301.

VI. WHEN COURTS SHOULD ALLOW AMENDMENT OF AN AOM

Next we must determine under what circumstances a court should allow amendment of an AOM with content defects that affect the substantial rights of the parties. While allowing an amendment is a discretionary matter, a court should view a party's request to amend in light of the statutory directive that amendments should be in "the furtherance of justice, on such terms as are just . . . ."[24] If failing to allow amendment would result in the dismissal of a plaintiff's case with prejudice, as the majority holds in this case, the result would not be in the furtherance of justice. Such a result slams the courthouse doors in the plaintiff's face, leaving that plaintiff without a forum in which to pursue a claim that an expert has certified as meritorious.

Citizens of this state are entitled to a forum to resolve claims on their merits. Furtherance of justice

[23] *Barber* favored curing defects in an affidavit by amendment and held that "[t]his power to cure errors and irregularities by amendment is a useful one, if wisely exercised, and when no provision to the contrary is made it applies as fully to attachment suits as to others." *Barber*, 41 Mich at 144. The defect at issue in *Barber* "was not such a defect as to necessarily and at once to destroy the process and put an end to the proceeding, but a defect remediable under the power of the court to correct errors in its proceedings during their progress." *Id*. at 145. Accordingly, *Barber* concluded that "in case the proceeding while open, and at a stage permitting correction by amendment, should be brought into question collaterally, it would not be competent to reject it as void on account of the defect." *Id*.; see also *Walden v Crego's Estate*, 288 Mich 564; 285 NW 457 (1939) (holding that statutorily required attachment affidavits that contain defects in content may be corrected by amendment).

[24] MCL 600.2301.

cannot be achieved without providing citizens access to justice. Access to justice is a cornerstone of our system of jurisprudence, and without it, confidence in the judiciary is lost. Allowing for amendment of an AOM to correct defects in content is in the furtherance of justice. Such relief permits a plaintiff to pursue his or her claim and have it decided on its merits rather than on a hypertechnical reading of an AOM or a misguided reading of the AOM statute.

Unfortunately, instead of following the rule of law, the majority denies the plaintiff in this case access to justice by rewriting the language of the AOM statute in order to come to its result.

VII. CONCLUSION

I respectfully dissent from the majority's decision to dismiss this medical malpractice action with prejudice. The majority's conclusions are erroneous because plaintiff's AOMs were not defective and even in cases involving AOMs with content defects, MCL 691.2301 clearly provides relief. Moreover, the plain language of the AOM statute does not contemplate, let alone require, that a plaintiff's complaint be dismissed with prejudice for defects contained in an affidavit. The majority's decision ignores the plain language of the relevant statutes. The majority abandons the rule of law and reaches its result by rewriting the applicable statutes.

PEOPLE v RICHARDSON

Docket No. 141752. Argued May 10, 2011. Decided July 29, 2011.

A Wayne Circuit Court jury convicted Donald C. Richardson of two counts of assault with intent to commit great bodily harm less than murder and one count of possession of a firearm during the commission of a felony. During the trial, defendant argued that he had acted in self-defense. The court, Thomas E. Jackson, J., had instructed the jury on self-defense using CJI2d 7.16, which permits consideration of whether the defendant had a duty to retreat. Because defendant was on his porch during the altercation, however, he had no duty to retreat. Defendant appealed in the Court of Appeals and filed a motion for bond pending appeal. The Court of Appeals denied defendant's motion for bond, and the Supreme Court denied defendant's application for leave to appeal that order. 485 Mich 1044 (2010). The Court of Appeals, SHAPIRO, P.J., and SAAD and SERVITTO, JJ., then affirmed defendant's convictions in an unpublished opinion per curiam, issued July 27, 2010 (Docket No. 291617). The Supreme Court ordered and heard oral argument on whether to grant defendant's application for leave to appeal or take other peremptory action. 488 Mich 1055 (2011).

In an opinion by Justice MARILYN KELLY, joined by Chief Justice YOUNG and Justices CAVANAGH, HATHAWAY, and ZAHRA, the Supreme Court *held*:

The trial court did not commit plain error when it instructed the jury using CJI2d 7.16. The instruction correctly informed the jurors that if defendant was in his home, he did not have to retreat. The court also correctly instructed the jurors that a person's porch is considered part of his or her home, which removed any remaining questions about whether defendant had a duty to retreat. An instruction that omitted the general duty to retreat and informed the jury only that defendant had no duty to retreat in this case might have been clearer, but defense counsel failed to request such an instruction, and the trial court was not required to sua sponte give that instruction. Nothing in the Supreme Court's caselaw required the judge in this case to sua sponte give the jury an instruction not to let the fact that

defendant did not retreat into his house enter its deliberations. *People v Riddle*, 467 Mich 116 (2002), addressed this question in a footnote in dictum. Because the Court concluded that the defendant in *Riddle* was not in his dwelling when he was attacked, this footnote was not necessary to *Riddle*'s holding and is obiter dictum. The factual dispute in this case centered on whether defendant honestly and reasonably believed that he was entitled to use deadly force. The instruction given correctly informed the jury that defendant was entitled to use deadly force in self-defense only if it was necessary to do so. After being properly informed that defendant had no duty to retreat if attacked in his home, the jury concluded that deadly force was not necessary in defendant's situation.

Affirmed.

Justice MARKMAN, joined by Justice MARY BETH KELLY, dissenting, would have reversed the judgment of the Court of Appeals and remanded for a new trial. In *Pond v People*, 8 Mich 150 (1860), the Supreme Court adopted the common-law castle doctrine, holding that a person is not obliged to retreat before using deadly force when assaulted in his or her dwelling; and in *Riddle*, the Court reaffirmed the castle doctrine, stating in all-capitalized letters that "Retreat is not a factor in one's dwelling," and asserting that if a defendant is attacked in his dwelling, the jury should not be permitted to consider retreat. Here, the trial court instructed the jury to consider whether defendant could have safely retreated when he was in his dwelling at the time of the alleged assault and had no obligation to retreat. This instruction is contrary to law in which the only proper instruction would have prohibited the jury from considering retreat. Because defendant's claim of self-defense was the determinative issue at trial, and because in light of a note sent to the trial court it was clear that the jury had considered defendant's ability to retreat, the error resulted in outcome-determinative prejudice.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Kym L. Worthy*, Prosecuting Attorney, *Timothy A. Baughman*, Chief of Research, Training, and Appeals, and *Toni Odette*, Assistant Prosecuting Attorney, for the people.

State Appellate Defender (by *Marla R. McCowan*) and Donald C. Richardson, *in propria persona*, for defendant.

MARILYN KELLY, J. This case involves the use of deadly force, allegedly in self-defense. The Court heard oral argument on whether to grant leave to appeal.[1] We asked the parties whether the trial court was correct when it instructed the jury using CJI2d 7.16, which permits consideration of whether the defendant had a duty to retreat.[2]

We hold that it was appropriate to use the standard jury instruction in this case. Defendant was on his porch during the altercation in question, so he had no duty to retreat. However, there was adequate evidence from which the jury could conclude that he did not need to use deadly force to defend himself. Rather than grant leave to appeal, we affirm defendant's convictions for assault with intent to commit great bodily harm less than murder and possession of a firearm during the commission of a felony (felony-firearm).

Defendant and his wife had a poor relationship with some of their neighbors, including the Moores, which resulted in several altercations predating the events involved in this case. On September 25, 2008, the son of Brandy Abrams, one of the victims, allied with other neighbors to hurl insults at defendant and his wife and throw rocks and eggs at their home. Defendant's wife responded in kind. At some point, she struck the Abrams boy in the chest, and someone called Brandy Abrams to inform her.

Brandy Abrams arrived at defendant's home about 15 minutes later. She battered the screen door of defendant's enclosed front porch with a baseball bat. She claimed that she did it in reaction to defendant's wife, who was ranting, raving, spitting at her, and

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[1] *People v Richardson*, 488 Mich 1055 (2011).

[2] See MCL 768.21c; *People v Riddle*, 467 Mich 116, 134, 141 n 30; 649 NW2d 30 (2002).

threatening to "whoop my ass." Abrams acknowledged that she threatened to assault defendant's wife.

Defendant got his wife to step inside their home. He claimed that Abrams, bat in hand, next directed her threats against him. Defendant testified that a second person, Dennis Dinwiddie, then approached defendant's porch door in a threatening manner. Abrams and Dinwiddie contested that testimony and claimed instead that Dinwiddie attempted to defuse the situation by taking Abrams by the arm and leading her back toward the Moores' house.

It is agreed that at this point defendant remonstrated that he was "getting tired of this shit," pulled out one of his three loaded handguns, and fired six times. Both Abrams and Dinwiddie were shot and injured, Abrams in her side, arm, and leg and Dinwiddie in his chest and posterior flank.

Defendant was charged with two counts of assault with intent to commit murder,[3] two counts of assault with intent to do great bodily harm less than murder,[4] two counts of felonious assault,[5] and one count of felony-firearm.[6] At trial, he asserted a theory of self-defense. At the close of trial, the court read CJI2d 7.16 to the jury. The portion of that instruction most pertinent to our analysis states:

> (1) A person can use deadly force in self-defense only where it is necessary to do so. If the defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the defendant honestly and reasonably believed [he/she] needed to use deadly force in self-defense.

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[3] MCL 750.83.

[4] MCL 750.84.

[5] MCL 750.82.

[6] MCL 750.227b.

> (2) However, a person is never required to retreat if attacked in [his/her] own home, nor if the person reasonably believes that an attacker is about to use a deadly weapon, nor if the person is subject to a sudden, fierce, and violent attack. [CJI2d 7.16.]

After one day's deliberations, the jurors sent a note to the judge asking for clarification of what constituted defendant's "home." The court explained that an individual has no duty to retreat before using deadly force if in his or her own home or in the curtilage of that dwelling. The court further explained that "curtilage" generally means land or a yard adjoining a house, usually within an enclosure.

Two days later, the jurors notified the court that they could not reach a decision. The court reinstructed them on self-defense, explaining that people "can actually be in their home, their dwelling and not be subject to self-defense unless those circumstances them self [sic] justify that." The court asked the jurors to continue deliberating and reread CJI2d 7.16, but it did not reinstruct them on the definition of "curtilage." Defendant objected to the refusal to reinstruct on curtilage but did not object to the jury instructions in any other way or at any other point.

At oral argument in this Court, defense counsel contended that the trial court erred by giving CJI2d 7.16. Counsel asserted that the court should have instructed the jury that defendant had no duty to retreat because it was undisputed that he was in his home when attacked.

When this Court reviews jury instructions for reversible error, we consider the instructions as a whole.[7] In this case, although the jury was told that there is a

[7] *People v Kelly*, 423 Mich 261, 270-272; 378 NW2d 365 (1985).

general duty to retreat, that instruction was immediately followed by the word "however." This qualifier informed the jury that an exception to that general rule would follow. Then, the trial court instructed the jury that there is never a duty to retreat when attacked in one's home.

The trial court's instructions tracked CJI2d 7.16 almost verbatim. While "[t]rial judges should not hesitate to modify or disregard the [criminal jury instructions] when presented with a clearer or more accurate instruction,"[8] in this case defense counsel requested no alternative instruction. We cannot agree with defendant's position, which would require trial courts to sua sponte depart from the criminal jury instructions under circumstances such as those presented here.

At trial, the prosecutor never argued that defendant was required to, or even should have, retreated from the altercation. In attempting to rebut defendant's self-defense claim, the prosecutor argued only that defendant could not establish that he honestly and reasonably believed that he needed to use deadly force.

We conclude that defendant has not established that it was plain error for the court to instruct the jury using CJI2d 7.16. The instruction correctly told the jurors that, if defendant was in his home, he did not have to retreat. It also correctly informed them that defendant was entitled to use deadly force in self-defense only if it was necessary to do so.

It is apparent that the jury concluded that deadly force was not necessary and that the facts support that conclusion. An instruction that omitted the general duty to retreat and informed the jury only that defendant had no duty to retreat might have been clearer.

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[8] *People v Dykhouse*, 418 Mich 488, 494 n 1; 345 NW2d 150 (1984).

However, defense counsel did not ask the court to give such an instruction. And defendant was not prejudiced by this omission because the jury was, in fact, informed that a person attacked in his or her home has no duty to retreat. It was also instructed that a person's porch is considered part of his or her home.

The dissent raises several points warranting a response. We wholeheartedly agree with the dissent that the castle doctrine and the right of personal self-defense are longstanding and precious rights that we must vigorously uphold. But this case jeopardizes neither. The factual dispute was whether defendant honestly and reasonably believed that he was entitled to use deadly force.[9] The court correctly instructed the jury that defendant had no duty to retreat if attacked in his home. Once the trial court clarified that the porch was part of defendant's home, the jury instructions removed any remaining questions about whether defendant had a duty to retreat.

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[9] The dissent correctly asserts that there was record support for defendant's self-defense claim. By the same token, there was abundant evidence from which the jury could and did conclude that defendant's use of deadly force was not necessary. For example, (1) defendant and his wife had had an acrimonious relationship with their neighbors and a number of altercations with them in the past, (2) immediately before he shot the victims, defendant exclaimed that he was "getting tired of this shit," (3) a neighbor corroborated Dinwiddie's testimony that Dinwiddie was leading Abrams away from defendant's house when defendant shot them and testified that Dinwiddie and Abrams had reached the Moores' property when defendant opened fire, (4) a medical report indicated that one bullet likely struck Dinwiddie in the rear flank, (5) it is uncontested that defendant's wife was in no danger of physical harm when defendant opened fire, (6) there was no allegation that Dinwiddie or Abrams was assaulting defendant when he shot them, (7) neither Dinwiddie nor Abrams was carrying a firearm or knife, and (8) it is uncontested that defendant was unharmed when he opened fire. The jury had all the evidence it needed to conclude that defendant emptied his gun into two defenseless and retreating victims.

We further agree with the dissent that had the jury not been instructed that a person has no duty to retreat when attacked in his or her home, reversal would have been required. Our decision in *Pond v People*[10] and 150 years of subsequent caselaw clearly mandate such a result.

But nothing in that caselaw required the judge in this case to sua sponte give the jury an instruction not to let the fact that defendant did not retreat into his house enter its deliberations.[11] *People v Riddle* addressed this question in a footnote in dictum.[12] But we do not agree that the footnote mandates reversal in the instant case.

As noted, the success of defendant's self-defense claim did not hinge on whether he was required to retreat or stand his ground on his porch. Rather, it hinged on whether he honestly and reasonably believed that it was necessary to use deadly force while standing his ground.[13] After being properly informed that defendant had no duty to retreat if attacked in his home, the jury concluded that deadly force was not necessary. It recognized that the evidence showed that defendant

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[10] *Pond v People*, 8 Mich 150 (1860).

[11] It is this simple legal truth that renders untenable the dissent's claim that such an instruction would have been "the only proper instruction" under the facts of this case. *Post* at 139.

[12] *Riddle*, 467 Mich at 141 n 30 ("There might be circumstances in which an instruction permitting the jury to consider a defendant's failure to retreat would be improper; for instance, if the defendant was inside his dwelling when he was attacked or if the undisputed evidence established that he was suddenly and violently attacked."). Because we concluded that the defendant in *Riddle* was not in his dwelling when he was attacked, this footnote was not necessary to *Riddle*'s holding and is obiter dictum.

[13] We see nothing in the record to support the dissent's speculation that the jurors rejected defendant's self-defense claim in the belief that he should have retreated. It bears repeating that the prosecutor never argued that defendant should have retreated.

was unharmed and could have continued to stand his ground and remain unharmed without shooting the victims. The dissent makes the right arguments in the wrong case.

Finally, we do not agree with the dissent that it is "undisputed" that the jury considered whether defendant should have retreated rather than use deadly force.[14] The dissent asserts that, because the jury asked for clarification of what constituted defendant's "home," it must have considered defendant's failure to retreat. On the contrary, the jury was likely trying to determine whether the duty to retreat applied to defendant. Hence, in a note to the judge, it asked for clarification about whether defendant was in his home when standing on his porch. Once the judge clarified this point, the jury could determine that defendant had no duty to retreat and direct its attention, appropriately, to whether it was necessary for him to use deadly force. The note was sent *before* the judge clarified the meaning of "home." Hence, the dissent has no basis to conclude that the note proves that *after* the judge responded, the jury believed defendant had a duty to retreat.

We reject defendant's remaining claims of error for the reasons stated in the Court of Appeals' opinion. We reject his claim that trial counsel was ineffective for failing to call Dinwiddie's treating physician because defendant did not demonstrate that counsel's actions were anything other than reasonable trial strategy.[15] Therefore, we affirm defendant's convictions.

YOUNG, C.J., and CAVANAGH, HATHAWAY, and ZAHRA, JJ., concurred with MARILYN KELLY, J.

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[14] *Post* at 142 n 7.

[15] This issue was raised for the first time in this Court, so the Court of Appeals did not address it.

MARKMAN, J. (*dissenting*). Sixty-year-old defendant Donald Richardson, living at the same home in Detroit for more than 34 years with no prior criminal record, is currently serving a $5\frac{1}{2}$-year minimum prison sentence for shooting two people who, while under the influence of drugs and alcohol, came to his home after violent words had been exchanged and approached him on his front porch wielding a baseball bat. From his first encounter with the police to his appeal in this Court, he has consistently claimed that he acted in defense of himself and his family.

On these facts, defendant's claim of self-defense is neither surprising nor difficult to understand. By their communications to the trial court, many people living in his community certainly understood it, as, I believe, would many people who can imagine themselves in defendant's circumstances. However, his self-defense claim was not properly understood by the trial court and was not properly presented to the jury. Specifically, the trial court repeatedly told defendant's jury that retreat *could* be a factor in determining whether his use of force was necessary. This instruction was contrary to the common-law castle doctrine, which derives from this Court's seminal self-defense case, *Pond v People*, 8 Mich 150 (1860), which was recently reaffirmed in *People v Riddle*, 467 Mich 116, 134-135; 649 NW2d 30 (2002), and commands that there is no duty to retreat when a person is attacked in his or her own home. Moreover, defendant's jury was given inconsistent and unnecessarily complicated guidance on what constitutes the "home" for purposes of self-defense. Simply put, despite this Court's explicit and crystal-clear pronouncements concerning the law of self-defense and retreat, the jury was never told that under the circumstances of this case, retreat could *not* constitute a factor in its deliberations because, on the undisputed facts,

defendant as a matter of law had no duty to retreat. As a result of the court's failure to give this instruction, it is equally undisputed that the jury did, in fact, consider retreat in its deliberations.

Today, a majority of this Court concludes that the failure to give this simple instruction required by Michigan law was not in error because the instructions given, taken as a whole, were essentially "good enough." Because this holding is contrary to both *Pond* and *Riddle*; because this Court must continue to speak strongly and clearly on the right of self-defense, particularly with regard to the sometimes difficult and insecure environments of some of our state's largest cities; and because the instructional error here was far from harmless, implicating a quintessential right of a free society, on which the Second Amendment of our Constitution is predicated—the right of personal self-defense—I respectfully, but very strongly, dissent.

I. FACTS AND PROCEEDINGS

The events leading up to the incident at defendant's home were disputed. Witnesses provided contradictory testimony, and some witnesses, especially the victims, changed their stories multiple times. However, the pertinent facts can be fairly summarized as follows. Defendant is a retiree who worked for the city of Detroit for 30 years, living at the same home in the city for 34 years. During that time, defendant's neighborhood grew increasingly unstable, and security diminished further when new renters moved into the house next door. These neighbors threw trash in the Richardsons' yard, vandalized their property, and verbally abused them. The Richardsons' conflicts with the renters were well known to defendant's friends and fellow church members, who characterized the neighbors' behavior as

"harassment [that] was nonstop." In one incident, people throwing rocks broke a window of defendant's home. In another incident, which occurred a week before the shooting, relatives of the neighbors came into defendant's yard with a baseball bat. Defendant contacted the police, but received no response. According to defendant, he and his wife had repeatedly sought police protection from this kind of activity, but "didn't get any action," so he had contacted the county prosecutor, the Attorney General, the state police, and the Governor concerning what he viewed as the diminishing level of security in his neighborhood.

On September 25, 2008, defendant's wife, a 60-year-old homemaker and grandmother, had a confrontation with neighborhood children. Afterward, the mother of one of the children, Brandy Abrams, came to defendant's home swinging a baseball bat. Defendant testified that she hit him in the chest with the bat. Abrams denied this, but admitted that she had hit defendant's screen door and porch rail. Another friend of the neighbors, Dennis Dinwiddie, followed Abrams to defendant's home. Defendant and his wife claimed that Abrams and Dinwiddie both threatened them, although Dinwiddie claimed that he was trying to retrieve Abrams and defuse the situation.

At some point, defendant, who possessed a license to carry a concealed weapon, pulled out his lawfully registered firearm and shot at Abrams and Dinwiddie. At the time of the shooting, defendant was on his porch, and his wife was inside the house with their nine- and two-year-old grandchildren. Although Abrams and Dinwiddie provided varying testimony regarding exactly where they were standing, there is no question that they were in defendant's yard, if not on his front porch or front porch steps. Defendant then reloaded his

weapon and waited on the front porch for the police to come. Abrams sustained wounds to her arm, leg, and side, and Dinwiddie sustained wounds to his chest and posterior flank. A medical report suggested that the wound to his posterior flank was an exit wound, but Dinwiddie testified that he had been shot in the back. Testing at the hospital revealed high levels of marijuana, opiates, and alcohol in the victims' blood.

Defendant was charged with assault with intent to commit murder, MCL 750.83; assault with intent to do great bodily harm less than murder, MCL 750.84; felonious assault, MCL 750.82; and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. After deliberating for three days and being deadlocked at one point, the jury convicted him of two counts of assault with intent to do great bodily harm less than murder and one count of felony-firearm. At sentencing, the prosecutor requested an upward departure from the recommended minimum sentence range. Many of defendant's neighbors and fellow church members wrote to the trial court on defendant's behalf requesting leniency. The portrait of defendant gleaned from these letters is that of a law-abiding citizen who was an active member of his church and community for many years. The trial court sentenced defendant within the guidelines recommendation to 36 to 120 months in prison for each assault conviction, to be served consecutively to the two-year sentence for felony-firearm.

Defendant appealed in the Court of Appeals and also filed a motion for bond pending appeal. In his motion for bond, he emphasized his age, his lack of a criminal record, and his family's reliance on him, financial and otherwise, explaining that over the duration of the criminal proceedings, he had lost his home, his vehicles,

and his savings and was no longer able to support his wife on his fixed income. This motion was denied by the Court of Appeals, as well as by this Court, over my dissent. *People v Richardson*, 485 Mich 1044 (2010). The Court of Appeals then considered defendant's appeal on the merits and affirmed. *People v Richardson*, unpublished opinion per curiam of the Court of Appeals, issued July 27, 2010 (Docket No. 291617). This Court directed that oral argument be heard on whether to grant the application for leave to appeal, *People v Richardson*, 488 Mich 1054 (2011), and argument was heard on May 10, 2011.

II. STANDARD OF REVIEW

This Court reviews de novo claims of instructional error involving a question of law. *People v Dupree*, 486 Mich 693, 702; 788 NW2d 399 (2010).

III. ANALYSIS

A. SELF-DEFENSE & RETREAT

Michigan's seminal self-defense case, *Pond v People* in 1860, provided an enduring statement of the limits and the purpose of the right of self-defense:

> Human life is not to be lightly disregarded, and the law will not permit it to be destroyed unless upon urgent occasion. But the rules which make it excusable or justifiable to destroy it under some circumstances, are really meant to insure its general protection. They are designed to prevent reckless and wicked men from assailing peaceable members of society, by exposing them to the danger of fatal resistance at the hands of those whom they wantonly attack, and put in peril or fear of great injury or death. And such rules, in order to be of any value, must be in some reasonable degree accommodated to human character and

> necessity. They should not be allowed to entrap or mislead those whose misfortunes compel a resort to them. [*Pond*, 8 Mich at 173.]

In *Pond*, the defendant shot and killed Isaac Blanchard, a fellow commercial fisherman in the village of Seul Choix Point who had repeatedly harassed and threatened Pond, his family, and employees and had damaged his property.[1] Blanchard's abuse culminated when he and two accomplices came to Pond's home intoxicated and asked to search the house for him. When Pond's wife refused, the group began tearing down an outbuilding and choking an employee, acts that terrorized Pond's wife and small children. Pond heard the commotion and came out of his home armed with the shotgun with which he shot Blanchard. *Id*. at 159-161. After the shooting, he took "immediate steps to surrender himself to justice." *Id*. at 181.

At Pond's trial, the judge did not instruct the jury that there is no duty to retreat in one's home, and Pond was convicted of manslaughter. This Court reversed. The landmark decision articulated several rules of self-defense that have guided courts for more than 150 years.[2] First, the "necessity of taking life" must be judged by the circumstances as they appeared to the

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[1] The village at Seul Choix Point is east of what is now Manistique. For more details on the facts of *Pond*, as well as an enlightening discussion of the significance of the case in the jurisprudence of this state and the nation, see Peterson, *Pond v The People: Michigan Sets a Legal Precedent*, Michigan History, March/April 2011, at 37-41.

[2] *Pond* has been cited favorably as a leading self-defense case by the United States Supreme Court in *Beard v United States*, 158 US 550; 15 S Ct 962; 39 L Ed 1086 (1895), and by the highest courts of at least 22 states. See, e.g., *Crawford v State*, 231 Md 354; 190 A2d 538 (1963); *State v Couch*, 52 NM 127; 193 P2d 405 (1946); *Parrish v Commonwealth*, 81 Va 1 (1884), overruled in part by *Fortune v Commonwealth*, 133 Va 669; 112 SE 861 (1922); see also, Peterson, p 37 ("The court's landmark ruling [in *Pond*] established a precedent for the state and the nation.").

accused at the time of the attack. *Id*. at 173-174. As *Pond* explained, viewing necessity from the perspective of the accused is the only way to ensure that the rules of self-defense do not "entrap or mislead those whose misfortunes compel a resort to them" and will serve the purpose for which they are designed: "to prevent reckless and wicked men from assailing peaceable members of society . . . ." *Id*. at 173. Second, *Pond* adopted the ancient common-law castle doctrine in Michigan, expressly holding that "[a] man is not . . . obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to repel the assailant from his house, or to prevent his forcible entry, even to the taking of life." *Id*. at 177.

These principles were reaffirmed in 2002 in *Riddle*:

> [T]he cardinal rule, applicable to all claims of self-defense, is that the killing of another person is justifiable homicide if, under all the circumstances, the defendant honestly and reasonably believes that he is in imminent danger of death or great bodily harm and that it is necessary for him to exercise deadly force. [*Riddle*, 467 Mich at 142.]

"[T]he touchstone of any claim of self-defense . . . is *necessity*." *Id.* at 127. "As part and parcel of the 'necessity' requirement that inheres in every claim of lawful self-defense, evidence that a defendant could have safely avoided using deadly force is normally relevant in determining whether it was *reasonably necessary* for him to kill his assailant." *Id.* at 142. As a general rule, the duty to avoid using deadly force when safely possible requires consideration of whether a defendant could have safely retreated. *Id.* at 127.

Riddle straightforwardly identified three circumstances in which the general duty to retreat has no relevance or application, including the exception appli-

cable to the instant case, the castle doctrine. Citing *Pond*, it specifically reaffirmed the doctrine as it had existed at common law for more than 150 years and stated—in a boldface heading no less—that "RETREAT IS NOT A FACTOR IN ONE'S DWELLING." *Id*. at 134. Furthermore, in a passage that bears directly on this case, *Riddle* stated:

> There might be circumstances in which an instruction permitting the jury to consider a defendant's failure to retreat would be improper; for instance, if the defendant was inside his dwelling when he was attacked or if the undisputed evidence established that he was suddenly and violently attacked. In such a case there would be no basis for an instruction allowing the defendant's failure to retreat to be considered in determining whether he acted in lawful self-defense. [*Id*. at 141 n 30 (citation omitted).]

After examining the common-law castle doctrine, *Riddle* concluded that it was limited to "the dwelling and its attached appurtenances" and did not include the curtilage. *Id*. at 135.[3] Specifically, *Riddle* held:

> [W]hile the castle doctrine applies to all areas of a dwelling—be it a room within the building, a basement or attic, or an attached appurtenance such as a garage, *porch*,

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[3] This Court has defined "curtilage" as a "court-yard, back-side, or piece of ground lying near and belonging to a dwelling-house" and as "a space of ground within a common enclosure, belonging to a dwelling-house." *People v Taylor*, 2 Mich 250, 251-252 (1851) (quotation marks and citations omitted); see also Black's Law Dictionary (9th ed) (defining "curtilage" as "[t]he land or yard adjoining a house, [usually] within an enclosure"). *Pond* determined that the outbuilding or "net-house" at which the defendant had exercised his right of self-defense was a "dwelling or a part of the dwelling . . . ." *Pond*, 8 Mich at 181. *Riddle* thus concluded that "[b]ecause the only indication we have of the castle doctrine as it applied in Michigan at the time of the codification of our murder statute is that it applied '*in the dwelling,*' we lack the authority to now extend this rule to areas beyond 'the dwelling' itself." *Riddle*, 467 Mich at 136 (citation omitted). In responding to *Riddle* with the enactment of MCL 768.21c, the Legislature labored under no similar stricture.

> or deck—it does *not* apply to open areas in the curtilage that are not a part of a dwelling. [*Id.* at 138 (first emphasis added).]

Following our decision in *Riddle*, and in direct response, the Legislature enacted MCL 768.21c, which provides:

> (1) In cases in which [MCL 780.972] does not apply, the common law of this state applies except that the duty to retreat before using deadly force is not required if an individual is in his or her own dwelling or within the *curtilage* of that dwelling.
>
> (2) As used in this section, "dwelling" means a structure or shelter that is used permanently or temporarily as a place of abode, including an appurtenant structure attached to that structure or shelter. [Emphasis added.]

Accordingly, the statute extends the castle doctrine to include the curtilage of the dwelling, superseding the part of *Riddle* that held to the contrary. Thus, in accordance with *Pond*, *Riddle*, and MCL 768.21c, and at all times relevant to the instant case, when a person is attacked in his or her "dwelling,"[4] which undisputedly includes the "porch," "retreat is not a factor" to be considered in the jury's determination of whether a defendant's use of force was necessary. *Riddle*, 467 Mich at 134, 138, 141 n 30. To employ the emphatic presentation of *Riddle*, "RETREAT IS NOT A FACTOR IN ONE'S DWELLING." *Id.* at 134.

B. INSTRUCTIONAL ERROR

In its initial charge to the jury on self-defense, the trial court read CJI2d 7.16, entitled "Duty to Retreat to Avoid Using Deadly Force." The court stated:

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[4] The same is true, of course, with regard to the curtilage of that dwelling.

> [A] person can use deadly force and [sic] self-defense only where it is necessary to do so. If the Defendant could have safely retreated but did not do so, you may consider that fact in deciding whether the Defendant honestly and reasonably believed he needed to use deadly force and [sic] self-defense.
>
> However, a person is never required to retreat if attacked in his or her own home, nor if the person reasonably believed that the attacker is about to use a deadly weapon, nor if the person is subject to a sudden fear [sic] and violent attack.

Notably in this instruction, the jury was expressly told to consider whether "the Defendant could have safely retreated . . . ." Subsequently, in the qualifying statement that followed, which provided three exceptions to the general rule, the jury was told that there is no duty to retreat "in [one's] home."

After deliberating for a day, the jury sent a note asking:

> What is consider[ed] the defendants "home"? to understand Self defense?
>
> Need clarification—Can the Judge instruct us?

At this point, apparently for the first time during defendant's trial, the court became aware of MCL 768.21c. Defense counsel belatedly brought the statute to the court's attention and requested that the court instruct the jury on the meaning of "dwelling" and the definition of "curtilage." The court agreed and, relying on Black's Law Dictionary, responded to the jury's question accordingly:

> There is a definition, and we can just sort of put at rest just the home word right now. There is—the statute says that in cases of self-defense the common law of this state applies except that the duty to retreat before using deadly force is not required if an individual is in her own home or

> dwelling or within the curtilage of that dwelling. And curtilage, as a general definition, meaning land or yard adjoining a house usually within an enclosure.

The court did not repeat CJI2d 7.16 at this point.

Two days later, the jury notified the court that it still could not reach a decision. The court instructed the jury to continue deliberating and reinstructed on self-defense. This time the court extemporized and added the following:

> The law in general says a person has the duty to retreat except in some circumstances. We talked about that the other day, about how if a person may be—we used the home, dwelling, curtilage and so forth. But understand again, someone can actually be in their home, their dwelling and not be subject to self-defense unless those circumstances themselves justify that.
>
> I want to make sure that no one is under the impression, some people that have that, if someone comes to someone's house or on their property and if they kill or use deadly force automatically that justifies and that's self-defense. The law is that you have to follow the rules of law and make an analysis as to whether or not those circumstances are such that fit or justify self-defense.

The court also reread CJI2d 7.16, but did not reinstruct on the definition of "curtilage." Defense counsel objected to this omission and requested that the trial court repeat the curtilage instruction, but the court declined to do so. Later that same day, the jury returned with a verdict of guilty.

In its review of the jury instructions, the Court of Appeals focused on the trial court's failure to consistently define "home" in the law of self-defense and its refusal to reinstruct on curtilage. Those errors, however, are secondary to the fundamental and most glaring instructional error that occurred at defendant's

trial. That is, defendant's jury was never told that, on the undisputed facts of this case, defendant had no duty to retreat as a matter of law and therefore that the jury was not permitted to consider retreat as a factor in its deliberations. Because defendant was on his porch and the victims were, at the very least, within his yard, there was no question that defendant was attacked in his dwelling or within the curtilage of that dwelling. See *Riddle*, 467 Mich at 138; MCL 768.21c(1). Thus, under both the common law and the statute, he had no duty to retreat, and pursuant to *Riddle*, the jury should have been clearly and straightforwardly told that it was not "permit[ed] . . . to consider" retreat in its determination of whether defendant's use of force was necessary. *Riddle*, 467 Mich at 141 n 30.

It is worth reflecting on why *Riddle* would offer this forceful direction concerning why merely "permitting the jury to consider" a defendant's failure to retreat would be improper in circumstances exactly like those in the instant case. *Id*. I suggest that, in part, this direction has to do with the very purpose of, and justification for, the castle doctrine. This justification is not hard to understand, and many classic formulations exist. As *Riddle* explained, "in a very real sense, a person's dwelling is his primary place of refuge. Where a person is in his 'castle,' there is simply *no safer place* to retreat." *Id*. at 135. Thus, when we consider the perspective of the defendant—as is required in any self-defense case—it is evident why the law affords special and particularly robust protection to the home, for what could be more frightening than to feel unsafe and powerless against an attacker in one's own home? Where could the use of force be felt more necessary? In addition, I believe that the reason *Riddle* spoke so emphatically on this subject was because it recognized that there would perpetually be the temptation to argue

that a defendant *might* have retreated farther before exercising his right of self-defense, no matter what his venue in confronting an attacker. Why, after all, should the fact that a defendant has retreated beyond some relatively artificial point—i.e., curtilage, porch, home—mitigate entirely a continuing obligation to retreat further if he could safely do so and thereby avoid inflicting harm on his attacker? That is, there would always be a temptation for some jurors to focus on the continuity of the retreat, rather than on the 'discontinuity' of the proposition that at some defined point, retreat is no longer a relevant concept. This temptation would have been all too present for the jurors in this case, given that defendant was on his porch and he could obviously have retreated into his house, just as his wife had already done.

In this way, the instant case illustrates well why *Riddle*'s strong and clear direction regarding the castle doctrine is warranted. It also illustrates well why it is so important that this Court continue to speak strongly and clearly regarding the right of self-defense. "[T]he fundamental goal of a castle doctrine law is to preserve life by guaranteeing the vulnerable home dweller the right to save him or herself in situations where the state is unable to intervene." Note, *A defensible defense?: Reexamining castle doctrine statutes*, 47 Harv J on Legis 523, 549 (2010). Although the use of force to protect life and property is primarily the duty of the state, the state does not possess a monopoly in this regard. US Const, Am II; see also *District of Columbia v Heller*, 554 US 570, 628; 128 S Ct 2783; 171 L Ed 2d 637 (2008) (stating that "the inherent right of self-defense has been central to the Second Amendment right," and "the need for defense of self, family, and property is most acute" in the home); *McDonald v City of Chicago*, 561 US ___, ___; 130 S Ct 3020, 3044; 177 L Ed 2d 894

(2010) ("[T]he Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home."). When the state fails to fulfill its responsibilities, people are more likely to be confronted with the need to exercise their right of self-defense, and difficult factual issues and complex legal issues are likely to arise. Any lack of clarity concerning the boundaries within which this right begins and ends will inevitably "entrap or mislead those [citizens] whose misfortunes compel a resort to them." *Pond*, 8 Mich at 173.

In sum, the law of self-defense and retreat is clear, and a correct instruction should not have been difficult to craft on the facts presented. The following would have sufficed: "Defendant was on his porch when he was attacked. Thus, as a matter of law, he had no duty to retreat and you should not consider retreat in your consideration of whether his use of force was necessary." Instead, as is plainly seen in the instructions quoted previously, defendant's jury was repeatedly told that retreat could be a factor in its deliberations, and it was given inconsistent and confusing instructions about what constitutes the "home" in the law of self-defense.

C. PLAIN ERROR

Because defense counsel did not object to the instructions given, defendant is entitled to relief only if he can establish that (1) there was error, (2) the error was plain, (3) defendant was prejudiced by the plain error, and (4) the plain error "resulted in the conviction of an actually innocent defendant" or the plain error " ' "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.' " *People v Carines*, 460 Mich 750,

763; 597 NW2d 130 (1999) (citation omitted). The majority acknowledges that "[a]n instruction that omitted the general duty to retreat and informed the jury only that defendant had no duty to retreat might have been clearer," *ante* at 120, but ultimately determines that the instructions given were clear enough. I cannot agree. In my view, because the instructions given were contrary to MCL 768.21c(1), *Riddle*, and *Pond*, they were plainly erroneous.

The majority posits two arguments in an attempt to avoid this conclusion. First, the majority invokes the principle that jury instructions must be taken "as a whole," see *People v Kelly*, 423 Mich 261, 270-272; 378 NW2d 365 (1985), and argues that, because the instruction on the general duty to retreat was followed by the word "however," the jury was adequately informed that it should apply an exception to the general rule. With all respect, I am not persuaded. The majority has not even correctly formulated the proper instruction. The law of self-defense is not that there is some "general duty of retreat," albeit with certain exceptions, but that retreat is not even a relevant concept within one's dwelling or the curtilage of that dwelling, and therefore, under *Riddle*, retreat is not even permitted to be considered by the jury in that situation.[5] Therefore, it was not

[5] Faced with this Court's explicit, highly emphasized, and uniquely all-capitalized statement in *Riddle* that "RETREAT IS NOT A FACTOR IN ONE'S DWELLING" and this Court's additional statement that even "permitting the jury to consider a defendant's failure to retreat would be improper" in circumstances like those of the instant case, the majority now characterizes the latter as dictum. *Riddle*, 467 Mich at 134, 141 n 30. If anything, however, the fact that *Riddle* went out of its way to anticipate this very problem and to opine with rare forcefulness that such an instruction would be improper lends heightened significance to the latter statement in *Riddle*. Moreover, characterizing this statement as "dictum" as a basis for disregarding its guidance in the instant case can only interject uncertainty into the law of self-defense. The majority says

proper to introduce the broad duty of retreat as a relevant factor for the jury's consideration and then negate that duty with several exceptions, only one of which could have applied on these facts. When, as here, defendant was indisputably within the zone in which an individual's obligations under the law of self-defense become transformed, the only proper instruction would have affirmatively *prohibited* the jury from considering retreat because defendant was on his porch and thus had no duty to retreat as a matter of law. *That* was the instruction that the law required on the facts of this case, and the majority is unable to identify where the instructions, "taken as a whole" or otherwise, communicated this fundamental principle to the jury.

Second, the majority excuses the instructions because they "tracked CJI2d 7.16 almost verbatim." *Ante* at 120. However, far from insulating the error in this case, the trial court's reliance on the standard jury instruction is indicative of the problem with the standard jury instruction. There is no rule requiring that standard jury instructions be read, much less be read in full, when portions of those instructions are inapplicable to the facts of the case. As we stated in *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985):

> [W]e remind the bench and bar once again that the Michigan Criminal Jury Instructions do not have the official sanction of this Court. Their use is not required, and trial judges are encouraged to examine them carefully

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it "wholeheartedly agree[s] . . . that the castle doctrine and the right of personal self-defense are longstanding and precious rights that we must vigorously uphold," *ante* at 121, but its disregard for the two opinions of this Court that gave the most practical expression to this doctrine and this right belie that assertion. Indeed, it is difficult to recall any case in the annals of this Court in which a more unequivocal statement concerning instructional error has been so thoroughly disregarded with so little explanation.

> before using them, in order to ensure their accuracy and appropriateness to the case at hand.

The trial court in this case did not "ensure [the instructions'] accuracy and appropriateness to the case at hand." *Id*. The majority may not want to "require trial courts to sua sponte depart from the criminal jury instructions under circumstances such as those presented here," *ante* at 120, but that is exactly what the law requires trial courts to do, and I am confident that Michigan trial judges are fully capable of tailoring standard jury instructions to the specific facts before them. Indeed, this is their responsibility and obligation. *People v Lambert*, 395 Mich 296, 304; 235 NW2d 338 (1975) ("It is the function of the court to inform the jury of the law by which its verdict must be controlled. The purpose of instructions is to enable the jury to understand and apply the law to the facts of the case.").

In this case, the court was required to make CJI2d 7.16 appropriate to the undisputed facts by eliminating all language from the instruction indicating that defendant may have had some duty to retreat. In addition, the court should have told the jury, using the appropriate language, that defendant did not have a duty to retreat because he was on his "porch" and in his "home." Instead, the instructions informed the jury of the general duty to retreat, then set forth the several exceptions, only one of which was applicable on these facts, and finally cluttered the jurors' minds with irrelevant legal terms like "abode" and "appurtenant structure."

Having determined, in my judgment, that plain error occurred, I next consider whether the error resulted in outcome-determinative prejudice.[6] In determining

[6] In summarizing the "abundant evidence from which the jury could and did conclude that defendant's use of deadly force was not necessary," the majority incorrectly suggests that there is some question in this case

whether such prejudice occurred, we review the entire record, including both the jury instructions and the evidence. *Carines*, 460 Mich at 772 n 18. That review makes it apparent that defendant's assertion of innocence rested *solely* on his claim of self-defense. This was *the* exclusive and determinative issue at trial, and by all indications it was not an easy issue for the jury. By instructing the jury that retreat could be a relevant factor in its deliberations, the court went far in foreclosing the jury's consideration of defendant's self-defense argument because the evidence clearly indicated that defendant *could have* retreated further. He was on his porch, and he could have retreated into his house, just as his wife did. And, significantly, we need not speculate about whether the jury considered retreat as a factor in its deliberations because it *expressly* indicated that it did so in its note asking:

> What is consider[ed] the defendants "home"? to understand Self defense?

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about the sufficiency of the evidence. *Ante* at 121 n 9. To be clear, there is not. The only question is whether the instructional error that permitted the jury to consider retreat prejudiced defendant.

Nonetheless, I do question the accuracy and relevancy of the majority's summarization of the evidence. Specifically, it is unclear to me why it matters that "neither Dinwiddie nor Abrams was carrying a firearm or knife," *ante* at 121 n 9, when it is undisputed that they came to defendant's home wielding a baseball bat. I am also confused about why the majority repeatedly notes that "defendant was *unharmed*" in the incident at his home. *Ante* at 121 n 9, 122-123 (emphasis added). If the majority means that defendant was not physically harmed, the law of self-defense does not require physical injury before a person may exercise his or her right of self-defense, and this fact is immaterial to the application of the castle doctrine. Finally, in light of the undisputed fact that Dinwiddie and Abrams were under the influence of drugs and alcohol when they confronted defendant with fighting words and a baseball bat at his home, as well as the historical context underlying this confrontation, the majority's summation that "defendant emptied his gun into two defenseless and retreating victims" seems more than a little bit overstated. *Ante* at 121 n 9.

Need clarification—Can the Judge instruct us?

There was simply no other reason for the jury to inquire into the meaning of "home" in the law of self-defense if it was not struggling with the question whether defendant did or did not have a duty to retreat.[7] The jury should never have been permitted to consider this irrelevant and highly prejudicial question. *Riddle*, 467 Mich at 141 n 30. Thus, the failure to give a clear and

[7] Thus, contrary to the majority's assertion, there is, in fact, something "in the record" to support the conclusion that "the jurors rejected defendant's self-defense claim in the belief that he should have retreated." *Ante* at 122 n 13. The jury note is proof that the jury was considering and struggling with the issue of retreat. The majority states the obvious in observing that "[t]he note was sent *before* the judge clarified the meaning of 'home.' " *Ante* at 123. Of course the note was sent before the judge responded to it—the note is what compelled the judge's response. In any event, the judge's response in no way "clarified" the meaning of "home" for the jury. The judge began his response by telling the jury to "put at rest just the home word right now." He then referred to MCL 768.21c and set forth the castle doctrine under the statute. He then defined "curtilage," explaining that "curtilage, as a general definition, mean[s] land or yard adjoining a house usually within an enclosure." He never quite got around to answering the jury's question by defining "home," and his instructions in the end obscured, not clarified matters. The jury should never have been told to "put at rest . . . the home word," because defendant was on his porch, which is, and which has always been, part of the "home" under the common law of self-defense. See *Riddle*, 467 Mich at 138. Accordingly, the references to MCL 768.21c, the restatement of the castle doctrine, and the redefinition of "curtilage" were irrelevant in responding to the jury's straightforward question. In sum, the jury was asking for clarification about what comprised the "home" in the context of a case in which defendant was undisputedly on his porch. On these facts, the proper response was simple: "The porch is considered the home in the law of self defense. Thus, defendant had no duty to retreat as a matter of law." Still, the majority discounts the jury's note, which is objective evidence of what the jurors were actually thinking about in their deliberations because, in its view, "the success of defendant's self-defense claim did not hinge on whether he was required to retreat or stand his ground on his porch." *Ante* at 122. The majority may assert this, but its members were not in the jury room, where it is undisputed that jurors were considering and struggling with the issue of retreat without the benefit of accurate instructions.

straightforward instruction that defendant had no duty to retreat as a matter of law may have been the "equivalent to an instruction to the jury that the defendant had failed to justify the [assault] on the ground of self-defense." *People v Tomlins*, 213 NY 240, 245; 107 NE 496 (1914). As then Judge Cardozo reasoned in *Tomlins*, the defense "was submitted in form, but not in substance, for the submission was coupled with instructions that predetermined the answer." *Id.* at 245-246.

Furthermore, review of the jury instructions as a whole, and of the entire trial record, strongly suggests that this error was not isolated, but reflects a serious misunderstanding of the law that permeated defendant's trial. The trial court's statements at sentencing were highly reflective of this misunderstanding. Speaking to defendant at sentencing, the court stated:

> The law says that one should retreat if they can. To me, by the facts of this case, you could have gone into your house, based on the facts as I heard them. Your wife was inside. You could have gone into the house also. And if something had maybe developed from that point where somebody might have tried to break into your house and do some thing [sic], maybe this might have been looked at differently.

The problem is that the law does *not* say "that one should retreat if they can" when one is in his or her dwelling or within the curtilage of the dwelling, as defendant was. But the trial court presiding over defendant's trial instructed the jury as if it did, even after the court became aware of MCL 768.21c.

Finally, it is altogether possible that the plain error "resulted in the conviction of an actually innocent defendant." *Carines*, 460 Mich at 763. If defendant was indeed acting in self-defense, he is "actually innocent."

See *Riddle*, 467 Mich at 127 ("[T]he killing of another person in self-defense is justifiable homicide . . . ."). At the very least, the plain error " ' "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.' " *Carines*, 460 Mich at 763 (citation omitted). Defendant's jury was instructed that it could consider the fact that defendant "could have safely retreated but did not do so," when it unquestionably should have been instructed that defendant had absolutely no duty or obligation to retreat. This erroneous instruction, in my judgment, most certainly "seriously affect[ed] the fairness" of defendant's trial. *Id.*

IV. CONCLUSION

Despite explicit and crystal-clear pronouncements on the law of self-defense and retreat by our state's judicial and legislative branches, defendant's jury was never properly instructed that, on the undisputed facts of this case, he had no duty or obligation to retreat and, therefore, that it was not permitted to consider retreat as a factor in its deliberations. Instead, the jury was repeatedly instructed that retreat *could* be a factor in deciding whether defendant's use of force was necessary and the jury did, in fact, consider retreat. In my judgment, these instructional errors prejudiced defendant and were especially consequential as they implicated a quintessential right of a free society—the right of personal self-defense. Therefore, I would reverse the judgment of the Court of Appeals and remand for a new trial—a trial in which defendant's jury is plainly instructed that it cannot consider retreat because defendant had no duty to retreat.

MARY BETH KELLY, J., concurred with MARKMAN, J.

KROHN v HOME-OWNERS INSURANCE COMPANY

Docket No. 140945. Argued April 5, 2011 (Calendar No. 5). Decided July 29, 2011.

Kevin Krohn brought an action in the Lenawee Circuit Court under the no-fault act, MCL 500.3101 *et seq*., seeking personal protection insurance benefits from his no-fault insurer, Home-Owners Insurance Company, for the costs of an experimental surgical procedure he underwent in Portugal after a motorcycle accident left him paraplegic. The procedure involved removing tissue containing stem cells from his sinus cavities and transplanting it into the injured area of his spine. Defendant moved for a directed verdict on the ground that the procedure was not reasonably necessary for plaintiff's care, recovery, or rehabilitation under MCL 500.3107(1)(a). The court, Timothy P. Pickard, J., denied the motion, ruling that whether the procedure was reasonably necessary was a question of fact. A jury rendered a verdict in favor of plaintiff, and defendant appealed. The Court of Appeals, CAVANAGH and K. F. KELLY, JJ. (FORT HOOD, P.J., dissenting), reversed in an unpublished opinion per curiam issued January 26, 2010 (Docket No. 283862), holding that plaintiff's failure to present expert testimony demonstrating that the procedure had gained general acceptance in the medical community required a directed verdict for defendant. The Supreme Court granted plaintiff's application for leave to appeal. 488 Mich 876 (2010).

In an opinion by Justice ZAHRA, joined by Chief Justice YOUNG and Justices MARKMAN and MARY BETH KELLY, the Supreme Court *held*:

A plaintiff seeking reimbursement from a no-fault insurance carrier for a medical treatment that is experimental and not generally accepted within the medical community must present objective and verifiable medical evidence that the treatment is efficacious in his or her care, recovery, or rehabilitation.

1. MCL 500.3107(1)(a) provides that personal protection insurance benefits are payable for all reasonable charges incurred for reasonably necessary products, services, and accommodations for an injured person's care, recovery, or rehabilitation. The statute does not define the term "reasonably"; however, dictionary defini-

tions of the word "reasonable" reflect the absence of personal sentiment, prejudice, and bias that are associated with a subjective point of view, which is one based on an individual's perceptions, feelings, or intentions rather than the externally verifiable phenomena associated with an objective viewpoint. Accordingly, what is reasonably necessary for purposes of MCL 500.3107(1)(a) must be determined under an objective perspective. The fact that the voters by referendum rejected 1993 PA 143, one provision of which excluded experimental treatment from no-fault coverage, was irrelevant to interpreting the existing statute.

2. An insured who is seeking reimbursement for an experimental surgical procedure must present evidence that the surgery is efficacious, that is, that it may result in care, recovery or rehabilitation. Because this determination involves the exercise of medical judgment, efficacy must be based on objective and verifiable medical evidence that is established through expert testimony. However, MCL 500.3107 does not require an insured to prove that an experimental surgical procedure has gained general acceptance in the medical community before a trier of fact may consider whether it was reasonably necessary. If there is objective and verifiable evidence that an experimental surgical procedure is efficacious, the fact-finder can determine whether the procedure was reasonably necessary by considering relevant factors, such as the severity and chronicity of the condition, the outcome of any previous treatment, the likelihood that alternative treatments would be efficacious, a personal physician's recommendation in conjunction with the patient's preference, and the short-term and long-term risks and benefits. Under MRE 702, the trial court must ensure that any expert testimony or scientific evidence is reliable. Specifically, the trial court must ensure that expert testimony is based on sufficient facts or data, is the product of reliable principles and methods, and that the witness applied the principles and methods reliably to the facts of the case.

3. Plaintiff failed to present evidence to establish that the experimental surgical procedure at issue presented him with an objectively verifiable chance that it would be efficacious in his care, recovery, or rehabilitation. In particular, one of plaintiff's expert witnesses did not endorse, recommend, or prescribe the procedure for plaintiff, testified that it was not regarded as necessary, and admitted that the outcome was uncertain because the procedure was new and experimental. The other expert failed to present medical evidence to support his theory of the procedure's benefit to plaintiff. Therefore, the procedure was not an allowable expense under MCL 500.3107(1)(a), and defendant was entitled to judgment as a matter of law.

Affirmed.

Justice HATHAWAY, joined by Justice CAVANAGH (except for footnote 20) and by Justice MARILYN KELLY, dissenting, would have upheld the jury's finding that the procedure performed on plaintiff was reasonably necessary and would have held that plaintiff is entitled to reimbursement of the costs associated with the procedure. She stated that by requiring objective and verifiable medical evidence of efficacy, the majority's holding added language to the no-fault act that the voters rejected by referendum and that the majority's holding erroneously removed the determination of which expenses are reasonably necessary from the jury and created a more stringent standard for proving that a treatment is reasonably necessary than MCL 500.3107(1)(a) requires.

INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — EXPERIMENTAL TREATMENTS — EVIDENCE.

A plaintiff seeking reimbursement from a no-fault insurance carrier for a medical treatment that is experimental and not generally accepted within the medical community must present objective and verifiable medical evidence through expert testimony that the treatment is efficacious in his or her care, recovery, or rehabilitation; if the plaintiff has provided this evidence and the trial court has ensured that it is reliable, the finder of fact may determine whether the treatment was reasonably necessary by considering such factors as the severity and chronicity of the condition, the outcome of any previous treatment, the likelihood that alternative treatments would be efficacious, a personal physician's recommendation in conjunction with the patient's preference, and the short-term and long-term risks and benefits of the treatment (MCL 500.3107[1]; MRE 702).

Logeman, Iafrate & Pollard, P.C. (by *Craig J. Pollard*), for plaintiff.

Conlin, McKenney & Philbrick, P.C. (by *Allen J. Philbrick*), for defendant.

Amici Curiae:

Dykema Gossett PLLC (by *Jill M. Wheaton* and *Joseph Erhardt*) for the Michigan Catastrophic Claims Association.

Speaker Law Firm, PLLC (by *Liisa R. Speaker*), and *Sinas Dramis Brake Boughton & McIntyre PC* (by *George T. Sinas*) for the Coalition Protecting Auto No-Fault.

Clark Hill PLC (by *James E. Brenner*) for the Michigan Defense Trial Counsel.

ZAHRA, J. Plaintiff, Kevin Krohn, who suffered an extremely severe spinal fracture that left him paraplegic, brought this suit under the no-fault act, MCL 500.3101 *et seq*. Plaintiff sought personal protection insurance benefits from defendant, Home-Owners Insurance Company, to cover costs incurred for a surgical procedure performed in Portugal. It is undisputed that this surgical procedure was experimental and not a generally accepted treatment for plaintiff's injury. The dispositive question presented in this case is whether this experimental procedure was a reasonably necessary service for plaintiff's care, recovery, or rehabilitation under MCL 500.3107(1)(a). We conclude that if a medical treatment is experimental and not generally accepted within the medical community, an insured seeking reimbursement for this treatment must, at a minimum, present objective and verifiable medical evidence establishing that the treatment is efficacious. A treatment or procedure that has not been shown to be efficacious cannot be reasonable or necessary under the no-fault act. An insured's subjective belief that medical treatment is efficacious, reasonable, and necessary is not enough to create a question of fact. Viewed in the light most favorable to plaintiff, the objective and verifiable medical evidence presented at trial failed to establish that the experimental surgical procedure at issue was in any way efficacious in plaintiff's care, recovery, or rehabilitation. Plaintiff's expert witnesses merely opined that plaintiff's decision to undertake the experimental surgical

procedure was an "understandable" personal decision that offered plaintiff only a medically unproven "possibility," or hope, for an efficacious result. Therefore, the procedure was not an allowable expense under MCL 500.3107(1)(a). We affirm the judgment of the Court of Appeals.[1]

I. FACTS AND PROCEEDINGS

On December 11, 2001, plaintiff was struck head-on by a large van while riding his motorcycle. Plaintiff suffered a severe spinal fracture that left him paraplegic, without sensation or function below the mid-chest area ("injury site"). Consequently, plaintiff was unable to touch his feet, move any part of his lower body, or determine when to relieve himself. Plaintiff underwent intensive physical therapy but did not regain any sensation below the injury site and was released from the program.

While investigating treatment options, plaintiff discovered a procedure known as olfactory ensheathing glial cell transplantation, an experimental surgery performed in Portugal. The procedure involves transplanting tissue from behind the patient's sinus cavities, which contains stem cells, to the injury site. The theory behind the procedure is that, once applied to the injury site, the transplanted stem cells could develop into spinal cord nerves. The procedure is not approved by the United States Food and Drug Administration (FDA) and therefore cannot be legally performed in the United States. In addition, there is insufficient existing research to allow for clinical trials, including controlled studies, peer review, and publication for FDA evaluation. Thus far, no one has applied for FDA approval of the procedure for any purpose.

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[1] Although we affirm the judgment of the Court of Appeals, we do so for reasons different from those stated by the Court of Appeals.

In March 2005, plaintiff visited the Rehabilitation Institute of Michigan (RIM) and discussed the procedure with Dr. Steven Hinderer. Dr. Hinderer specializes in physical medicine and rehabilitation and is the medical director of the Center for Spinal Cord Injury Recovery Program (CSCIRP). Dr. Hinderer explained to plaintiff that he could not endorse or in any way recommend the procedure because it was highly experimental, had not yet been approved by the FDA, could not be legally performed anywhere in the United States, and lacked medical evidence to establish its efficacy.[2] Neither party disputes that no one had yet applied for FDA approval of the procedure for any purpose, and the existing research was insufficient to allow clinical trials to begin. Dr. Hinderer also informed plaintiff that the procedure was not part of standard clinical care and was not likely to be covered by insurance. After consulting with Dr. Hinderer, plaintiff met with a patient who had undergone the procedure. Plaintiff claimed that this individual was able to stand on a device similar to a treadmill and walk with braces after the procedure.[3]

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[2] The dissent claims we erroneously conclude that Dr. Hinderer's testimony cast doubt on the efficacy of the procedure. Dr. Hinderer's testimony, however, merely suggested that the procedure required scientific research. The literature from the CSCIRP clearly outlined the highly experimental nature of this procedure. According to defendant's brief in this Court, the literature stated that "[t]here has been very little scientific data collection of the efficacy and long-term outcome of these procedures." The literature also encouraged those "who choose to pursue these alternative surgical procedures" to enroll in the RIM's clinical research study to "begin scientific knowledge" and "evaluate the effectiveness of these procedures." This literature was provided to plaintiff before he decided to undergo the procedure, and Dr. Hinderer's trial testimony was consistent with the CSCIRP literature.

[3] The medical history of this individual was not developed at trial and there was no medical evidence in the record establishing that the procedure caused any improvement this individual may have experienced.

After seeking advice from family members, plaintiff decided to undergo the procedure in Portugal. Plaintiff's primary health insurer denied coverage. Plaintiff then sought coverage from defendant, a no-fault auto insurance provider. Defendant's claims specialist told plaintiff that defendant would pay for testing to determine whether plaintiff medically qualified for the procedure, but would not pay for the procedure itself because it was experimental, non-FDA approved, and illegal to perform in the United States.

Plaintiff traveled to Portugal and underwent the procedure on November 10, 2005. Ten days later, plaintiff returned to the United States and began what he described as a grueling physical therapy program at the RIM, entailing four-hour therapy sessions three times a week. Defendant paid for all the postsurgical physical therapy treatment plaintiff received. Plaintiff filed suit against defendant to recover the expenses he incurred traveling to and from Portugal and undergoing the surgery. At trial, plaintiff testified that he noticed improvements immediately after the procedure. Specifically, plaintiff testified that he could sometimes move his legs, crawl forward and backward, and control bowel and bladder movements, resulting in fewer urinary tract infections.

Dr. Hinderer testified that plaintiff had experienced "some small amount of voluntary motor function" after the procedure. Dr. Hinderer also testified that it was not possible to conclude that these minor improvements were the result of the procedure. Dr. Hinderer acknowledged that the intense physical therapy program in which plaintiff engaged postprocedure could alone have accounted for plaintiff's improvements.[4] Dr. Hinderer

[4] Dr. Hinderer was asked whether he had seen patients make similar improvements after very aggressive physical therapy without this sur-

testified about the highly experimental nature of the procedure. He described plaintiff's decision to undergo the procedure as a "personal choice" and acknowledged that this procedure was not considered necessary to the treatment and care of spinal cord injuries.

Dr. Carl Lima, a neurologist and neuropathologist at a public hospital in Portugal who is not licensed in the United States, was a member of plaintiff's surgical team, but did not perform the procedure. According to Dr. Lima, experimental data showed that transplanting nasal tissue, which contains stem cells, to the injury site provides functional recovery of neurons. He testified that this research had begun 18 years earlier on guinea pigs. There was no evidence presented at trial that the procedure has been efficacious in guinea pigs. The testimony established only that the procedure could be performed on guinea pigs without the guinea pigs' developing infections or forming tumors.

Dr. Lima testified that he started conducting human trials of the procedure in the government-operated hospital where he works, which sanctions the procedure for research purposes. No testimony was offered to suggest that the hospital had sanctioned the procedure because of its efficaciousness. Dr. Lima testified that, since 2001, 110 patients have undergone the procedure; however, Dr. Lima did not offer testimony regarding individual patients, the severity or location of their injuries, the outcomes following their procedures, or their prognoses. Dr. Lima published a paper in 2006 that summarized the outcome for seven patients who had undergone the procedure. All seven patients engaged in physical therapy following the procedure, but only two of the seven showed improvements in bladder

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gery. He responded that he sees "improvements in virtually all participants [who undergo intensive physical therapy], surgery or no surgery."

and bowel control. Although there had been no controlled clinical studies regarding this procedure, Dr. Lima testified, "I would say the majority of the patients have some kind of improvement."[5]

Dr. Lima found plaintiff's spinal cord injury to be one of the most severe injuries that he had ever treated. Dr. Lima testified that he was very surprised by the "quite unexpected" results of plaintiff's procedure. Dr. Lima acknowledged that plaintiff would never fully recover from such a severe injury. Nonetheless, Dr. Lima testified that the procedure was necessary to allow plaintiff a chance at some recovery. He added that any degree of recovery requires physical therapy. Although Dr. Lima conceded that the procedure was experimental, he opined that it was reasonably necessary because a person with a chronic spinal cord injury has no other available option. The lack of FDA approval did not change Dr. Lima's opinion.

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[5] The dissent cites Dr. Lima's testimony as providing that "of the 110 patients who had undergone the treatment in his program, a majority of the patients showed improvement." *Post* at 180-181. However, the lower court record only reflects that Dr. Lima testified as follows:

> *Q*. Overall, would you describe—how would you describe the degree of success of the surgeries on patients?
>
> *A*. Well, maybe I'm not right person to say that, and that's why we want to publish the whole results of the patient, but I would say the majority of patients have some kind of improvement.

This testimony hardly demonstrates that a "majority of patients showed improvement." The testimony better reflects that Dr. Lima could only guess that the experimental surgical procedure was efficacious in some patients. More significantly, this testimony reflects Dr. Lima's assumption that any improvement that may have been noted was the result of the experimental surgical procedure and not physical therapy alone. As both Dr. Hinderer and Dr. Lima stated, and as plaintiff concedes, there is no evidence regarding the extent to which any improvement after this procedure can be attributed to the procedure alone, physical therapy alone, or a combination thereof. To this extent, the quoted testimony reflects an absence of the objectivity required to support a legal conclusion that the procedure is efficacious.

Defendant moved for a directed verdict, arguing that as a matter of law, experimental surgery is not "reasonably necessary" under the no-fault act. The trial court denied defendant's motion, ruling that whether the procedure was "reasonably necessary" was a question of fact. The jury rendered a verdict in favor of plaintiff, concluding that the procedure was reasonably necessary. Judgment was entered, awarding plaintiff $51,412.85 in allowable expenses, plus interest, case-evaluation sanctions, and taxable costs.

The Court of Appeals reversed. The Court of Appeals observed that because the dispositive issue required a review of medical judgment, plaintiff was required to present expert testimony.[6] Citing *SPECT Imaging, Inc v Allstate Ins Co*,[7] the Court of Appeals concluded that plaintiff was required to demonstrate that the procedure had gained general acceptance in the medical community.[8] Because plaintiff lacked such proof, the Court of Appeals concluded that a directed verdict in favor of defendant was required.[9] The dissent criticized the majority for sua sponte raising the issue of admissibility of scientific evidence because the issue was not preserved for appellate review.[10] The dissent also concluded that the question whether the procedure was "reasonably necessary" was properly submitted to the jury.[11]

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[6] *Krohn v Home-Owners Ins Co*, unpublished opinion of the Court of Appeals, issued January 26, 2010 (Docket No. 283862), p 3.

[7] *SPECT Imaging, Inc v Allstate Ins Co*, 246 Mich App 568, 578; 633 NW2d 461 (2001).

[8] *Id*. at 3-4.

[9] *Id*. at 5-6.

[10] *Id*. at 5 (FORT HOOD, P.J., dissenting).

[11] *Id*. at 8.

Plaintiff applied for leave to appeal in this Court. We granted the application to consider, among other issues, whether the experimental surgical procedure plaintiff underwent in Portugal was an allowable expense under MCL 500.3107(1)(a) of the no-fault act.[12]

II. STANDARD OF REVIEW

We review de novo a trial court's decision to direct a verdict.[13] In doing so, we "review the evidence and all legitimate inferences in the light most favorable to the nonmoving party."[14] Only if the evidence, when viewed in this light, fails to establish a claim as a matter of law should a motion for a directed verdict be granted.[15]

Issues of statutory interpretation are questions of law that this Court reviews de novo.[16]

III. ANALYSIS

A. BACKGROUND

The Michigan no-fault act requires that owners and registrants of automobiles carry personal protection insurance to cover an insured's medical care arising from injuries sustained in an automobile accident.[17]

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[12] *Krohn v Home-Owners Ins Co*, 488 Mich 876 (2010).

[13] *Sniecinski v Blue Cross & Blue Shield of Mich*, 469 Mich 124, 131; 666 NW 2d 186 (2003).

[14] *Id*. (quotation marks and citations omitted).

[15] *Id*.

[16] *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005).

[17] MCL 500.3101(1); MCL 500.3105(1). We note that while the no-fault act mandates the minimum insurance coverage to be obtained by an owner or registrant of an automobile, it does not bar an insured from obtaining insurance coverage in excess of that amount. As a preliminary matter, we note that all owners and registrants of automobiles in

This case requires us to determine whether the experimental surgical procedure undergone by plaintiff constituted a compensable expense under the personal protection insurance requirements of MCL 500.3107(1)(a). MCL 500.3107(1) provides in pertinent part:

> [P]ersonal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for *reasonably necessary* products, services and accommodations *for an injured person's care, recovery, or rehabilitation*. [Emphasis added.]

B. PRINCIPLES OF STATUTORY INTERPRETATION

The primary goal of statutory interpretation is to "ascertain the legislative intent that may reasonably be inferred from the statutory language."[18] "The first step in that determination is to review the language of the statute itself."[19] Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning,[20] taking into account the context in which the words are used.[21] We may consult dictionary definitions to give words their common and ordinary meaning.[22] When given their common and ordinary

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Michigan are free to purchase insurance contracts that provide greater coverage than the minimum required under the no-fault act.

[18] *Griffith*, 472 Mich at 526, citing *Sotelo v Grant Twp*, 470 Mich 95, 100; 680 NW2d 381 (2004).

[19] *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999), citing *House Speaker v State Admin Bd*, 441 Mich 547, 567; 495 NW2d 539 (1993).

[20] MCL 8.3a; *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 748; 641 NW2d 567 (2002).

[21] *2000 Baum Family Trust v Babel*, 488 Mich 136, 175; 793 NW2d 633 (2010).

[22] *Halloran v Bhan*, 470 Mich 572, 578; 683 NW2d 129 (2004).

meaning,[23] "[t]he words of a statute provide 'the most reliable evidence of its intent . . . .' "[24]

C. PRECEDENT

This is not the first time this Court has been called upon to interpret MCL 500.3107(1)(a). In *Nasser v Auto Club Ins Ass'n*,[25] this Court held that under MCL 500.3107(1)(a), "an insurer is not *liable* for any medical expense . . . if the product or service itself is not reasonably necessary."[26] This Court further observed that "[t]he plain and unambiguous language of [MCL 500.3107] makes both reasonableness and necessity explicit and necessary elements of a claimant's recovery, and thus renders their absence a defense to the insurer's liability."[27] This Court rejected the notion that public-policy concerns would require the payment of expenses for medical care not shown to be reasonable and necessary to the care of an insured. Justice BOYLE, writing for the majority, observed that "[w]hile policy considerations may indeed cause some reluctance on the part of courts to allow insureds to be 'stuck' with unnecessary expenses" that they incurred, "that determination was made by the Legislature when it drafted [MCL 500.3107] and restricted [personal protection insurance] benefits under a rule of reasonableness."[28] Finally, this Court recognized that while the question of

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[23] *Veenstra v Washtenaw Country Club*, 466 Mich 155, 160; 645 NW2d 643 (2002), citing MCL 8.3a.

[24] *Klooster v City of Charlevoix*, 488 Mich 289, 296; 795 NW2d 578 (2011), quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981).

[25] *Nasser v Auto Club Ins Ass'n*, 435 Mich 33; 457 NW2d 637 (1990).

[26] *Id*. at 49 (emphasis in original).

[27] *Id*.

[28] *Id*. at 55.

reasonable necessity under this provision is generally one for a jury, "it may in some cases be possible for the court to decide the question of the reasonableness or necessity of particular expenses as a matter of law . . . ."[29]

While *Nasser* made clear that the language of MCL 500.3107 only permits an insured to recover expenses that are reasonable and necessary to the care, recovery, or rehabilitation of the insured, *Nasser* provided little guidance on how properly to determine what is a reasonably necessary expense or when such a determination may be made as a matter of law. To provide guidance along these lines, we observe that the no-fault act does not require coverage for *all* treatments. Obviously, treatments such as apricot pit therapy, coning (ear candling), homeopathy, magnet therapy and psychic surgery are patently unreasonable. Even if administered by licensed health-care providers, these so-called treatments not only lack a scientific basis to conclude that they are generally accepted by the medical community, but there is simply no basis to conclude that they are at all efficacious. On the other hand, we presume, subject to rebuttal, that services generally accepted by the medical community for treatment or care of a specific and diagnosed injury are reasonably necessary under MCL 500.3107(1)(a). Less clear is the case presented here, in which an insured has undergone a surgical procedure that is not generally accepted by the medical community. Defendant maintains that experimental procedures, by their nature, cannot, as a matter of law, be reasonably necessary under the no-fault act. We reject defendant's position and conclude that experimental treatments are not necessarily barred from being compensable under the no-fault act. The ultimate

[29] *Id.*

question whether the surgical procedure at issue here is a covered expense under the no-fault act does not turn on its status as experimental. Rather, like all claims for allowable expenses, the question turns on whether the procedure was reasonably necessary for plaintiff's care, recovery, or rehabilitation.

D. MCL 500.3107(1)(a) MUST BE ASSESSED USING AN OBJECTIVE STANDARD

In order to give meaning to this statutory provision, we start by examining the perspective from which reasonable necessity is determined. Stated more precisely, when the Legislature provided that allowable expenses consist of "all reasonable charges incurred for *reasonably necessary* products, services and accommodations for an injured person's care, recovery, or rehabilitation," did it intend for reasonable necessity to be determined under a subjective or objective standard?

The term "reasonable" commonly refers to that which is "agreeable to or in accord with reason; logical," or "not exceeding the limit prescribed by reason; not excessive[.]"[30] The term "reasonable" has also been defined to mean "fair, proper, or moderate under the circumstances"[31] and "[f]it and appropriate to the end in view."[32] These definitions evidence an absence of the personal sentiment, prejudice, and bias associated with a subjective point of view, which is "based on an individual's perceptions, feelings, or intentions," rather than the "externally verifiable phenomena" associated with an objective viewpoint.[33] Accordingly, we conclude that reasonableness is not based merely on the subjec-

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[30] *Random House Webster's College Dictionary* (2000).

[31] Black's Law Dictionary (7th ed).

[32] Black's Law Dictionary (6th ed).

[33] Black's Law Dictionary (7th ed) (defining "subjective").

tive perception that a service is necessary for an injured person's care, recovery, or rehabilitation. Rather, the term "reasonably" must be determined under an objective perspective.

This conclusion is entirely consistent with this Court's precedent interpreting MCL 500.3107. In *Nasser*, the plaintiff was involved in a minor accident. Complaining of pain in his "head, neck, chest, shoulder, and both upper and lower back, as well as blurred vision and nausea, he initially sought medical treatment from an internist, who then admitted him to a hospital.[34] Over the following three months, he spent 50 days in the hospital and underwent a battery of medical tests.[35]

The plaintiff's no-fault insurer refused to pay for the plaintiff's hospitalization, and the plaintiff sued to recover allowable expenses under the no-fault act.[36] The trial court granted the plaintiff summary disposition on the issue of liability.[37] The Court of Appeals affirmed, citing policy considerations to justify allowing the plaintiff to rely on his subjective beliefs that his hospital expenses were "reasonably necessary" when he accepted treatment.[38] In doing so, the Court of Appeals also agreed with the plaintiff that "[t]he reasonableness of medical expenses cannot be used as a defense to liability in a no-fault accident case."[39] This Court rejected both the plaintiff's claims, clearly stating that the defendant insurer could challenge the reasonableness of

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[34] *Nasser*, 435 Mich at 38.

[35] *Id*.

[36] *Id*. at 38-39.

[37] *Id*. at 40-41.

[38] *Nasser v Auto Club Ins Ass'n*, 169 Mich App 182, 186; 425 NW2d 762 (1988).

[39] *Id*.

the plaintiff's expenses and impliedly rejecting the plaintiff's reliance on his subjective belief of reasonableness.[40]

This Court has also held when interpreting insurance contracts that the use of the term "reasonably" requires the application an objective standard unless it is used in reference to a particular person's point of view or expectation under certain circumstances.[41] In the companion cases of *Allstate Ins Co v Freeman* and *Metro Prop & Liability Ins Co v DiCicco*,[42] this Court distinguished between language identifying objective and subjective standards in exclusionary insurance clauses. In *Freeman*, this Court unanimously held that the phrase "reasonably be expected" unambiguously directed the use of an objective standard of expectation.[43] In *DiCicco*, a majority of this Court applied a subjective standard to an insurance policy that excluded "bodily injury or property damage which is either expected or intended from the standpoint of the insured."[44]

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[40] *Nasser*, 435 Mich at 48-50.

[41] Inasmuch as the no-fault act is statutorily mandated insurance coverage, we find it appropriate to seek guidance from insurance contract caselaw in regard to the meaning of the word "reasonably."

[42] *Allstate Ins Co v Freeman*, 432 Mich 656, 672; 443 NW2d 734 (1989).

[43] *Id*. at 688 (opinion by RILEY, C.J.); *id*. at 709 (opinion by BOYLE, J.); *id*. at 721 (opinion by ARCHER, J.).

[44] *Id*. at 672 (opinion by RILEY, C.J.); *id*. at 710 (opinion by BOYLE, J.); *id*. at 721 (opinion by ARCHER, J.). In *Fire Ins Exch v Diehl*, 450 Mich 678, 684; 545 NW2d 602 (1996), this Court addressed an insurance policy provision excluding " '[a] sudden event, including continuous or repeated exposure to the same conditions, resulting in bodily injury or property damage neither expected nor intended by the insured.' " The Court noted the provisions in both *Freeman* and *DiCicco*, then stated that,

> [in] [e]xplaining the distinction, Justice BOYLE noted that the [*Freeman*] policy required an objective standard because, of the two exclusionary phrases in the policy, the first exclusionary

More recently, in *Allstate Ins Co v McCarn (After Remand)*, we addressed an insurance policy that excluded coverage for damage that "may reasonably be expected to result" from an insured's intentional or criminal acts.[45] Because the contract used the phrase "reasonably expected," six members of this Court agreed that the contract required the application of an objective standard.[46]

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phrase applied to injury "reasonably" expected, and the policy counterpoised the first exclusionary phrase to the second phrase that applied if the injury was "in fact intended." Therefore, the first phrase must require application of an objective standard or the word "reasonably" loses its meaning and the second exclusionary phrase is redundant. On the other hand, the policy exclusion from the [*DiCicco*] policy did not contain the word "reasonably," but instead employed the phrase "from the standpoint of the insured." This language required application of a subjective standard. [*Id*. at 685 (citations omitted).]

The *Diehl* Court stated that the policy in question was "somewhere between the two policies at issue in *Freeman* and *DiCicco*," noting that, "[a]lthough the policy does not employ the term 'reasonably,' the phrase 'from the standpoint of the insured' is also absent." *Id*. The *Diehl* Court nonetheless held that "[t]he manner in which the policy employs the phrase 'by the insured' suggests that the emphasis of the policy is on whether the insured expected or intended the injury" and thus applied a subjective analysis. *Id*. In further support, the *Diehl* Court noted that a subjective approach to determining reasonableness is appropriate if the policy expressly directed consideration of the insured's subjective expectations. *Id*. at 685-686, quoting *Auto-Owners Ins Co v Churchman*, 440 Mich 560, 567-568; 489 NW2d 431 (1992) (holding that a policy exclusion for injury "expected or intended by an insured person" is unambiguous and requires a subjective standard) (quotation marks omitted).

[45] *Allstate Ins Co v McCarn (After Remand)*, 471 Mich 283, 289; 683 NW2d 656 (2004).

[46] *Id*. at 290, 297 (WEAVER, J. dissenting); *id*. at 302 (YOUNG, J., dissenting). Justice CAVANAGH concurred in the result only. We note a Court of Appeals decision, *Allstate Ins Co v Keillor (On Remand)*, 203 Mich App 36, 39-40, 511 NW2d 702 (1993), in which an objective standard was applied to a contractual exclusion for harm that " 'may reasonably be

The statutory provision at issue in this case uses the term "reasonably," and there is no statutory language suggesting that "reasonably" should be determined on a subjective basis. Most indicative that an objective standard applies is the absence of language providing for any particular point of view, such as "from the standpoint of the insured" or "by an insured person." Thus, although "reasonably necessary" is a broadly worded phrase, we conclude that this phrase must be assessed by using an objective standard.[47]

E. AN EXPERIMENTAL SURGICAL PROCEDURE CANNOT BE REASONABLY NECESSARY IF IT IS NOT EFFICACIOUS

Having determined that the term "reasonably necessary" must be assessed from an objective perspective, we next consider what it is that must be reasonably necessary under MCL 500.3107(1)(a): "products, services and accommodations" that are provided "for an injured person's care, recovery, or rehabilitation."[48] Thus, a service, product, or accommodation must be (1) objectively reasonable and (2) necessary for an insured's care, recovery, or rehabilitation.[49] If, as in this case, the service under consideration is an experimental surgical procedure, the insured must present evidence that the surgery may result in care, recovery, or rehabilitation. In other words, there must be evidence that the surgery is efficacious. Further, because a surgery

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expected to result from the intentional . . . acts of an insured person or which is in fact intended by an insured person.' "

[47] We note with approval the Court of Appeals' conclusion that evidence of the effects of a medical treatment on a plaintiff's condition, whether positive or negative in a particular case, is the type of post hoc evidence that is inconsistent with making an objective determination of whether medical treatment was "reasonably necessary." *Krohn*, unpub op at 4 n 2.

[48] MCL 500.3107.

[49] *Nasser*, 435 Mich at 50.

involves the exercise of medical judgment,[50] the efficacy determination must be based on objective and verifiable medical evidence. Experimental surgical procedures lacking objective and verifiable medical evidence of their efficacy cannot be "reasonably necessary" simply because it cannot be shown to effect the insured's care, recovery, or rehabilitation. To interpret MCL 500.3107(1)(a) as allowing reimbursement for nonefficacious experimental treatments "for an injured person's care, recovery, or rehabilitation" would be to read the phrase "reasonably necessary" out of this provision.[51]

Requiring the minimum threshold of efficacy in the context of experimental surgical procedures is consistent with our precedent regarding nonmedical allowable expenses. In *Griffith*, for example, we rejected the proposition that insurers were "obligated to pay for any expenses that an injured person would otherwise be provided in an institutional setting as long as they are remotely related to the person's general care."[52] Rather, we concluded that coverage "requires that allowable expenses be causally connected to a person's injury."[53]

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[50] See *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411; 423-424; 684 NW2d 864 (2004).

[51] Indeed, plaintiff's counsel conceded this point at oral argument when acknowledging that treatment with a placebo could not be considered "reasonably necessary" under the no-fault act. A placebo is "a pharmacologically inactive substance or a sham procedure administered as a control in testing the efficacy of a drug or course of action." *Random House Webster's College Dictionary* (2000). While a placebo may cause a subjective effect of "lessening of symptoms," see *id*. (defining "placebo effect"), the administration of a placebo is decidedly without objective efficacy. Like a placebo, treatments such as the procedure here that lack efficacy can provide no basis for concluding that they were "reasonably necessary" for an injured person's care, recovery, or rehabilitation.

[52] *Griffith*, 472 Mich at 539.

[53] *Id*. at 530-531.

We also emphasized that "the statute specifically limits compensation to charges for products or services that are reasonably necessary '*for an injured person's* care, recovery, or rehabilitation[,]' . . . suggest[ing] that 'care' must be related to the insured's injuries."[54] Just as *Griffith* required that expenses for food actually be related to a person's injury, so also do we require here that expenses for experimental medical treatment actually be for an injured person's care, recovery, or rehabilitation. This requires, at a minimum, that services be efficacious in an injured person's care, recovery, or rehabilitation.

If a surgical procedure is experimental, an insured cannot establish its reasonable necessity under MCL 500.3107 unless expert testimony indicates that the surgery presents a reasonable chance that it will be efficacious in the injured person's care, recovery, or rehabilitation. Contrary to the Court of Appeals' holding in this case, an insured is not required to prove that an experimental surgical procedure gained general acceptance in the medical community before its reasonable necessity becomes a question for consideration by the trier of fact.[55] MCL 500.3107(1)(a) does not require that medical treatment be shown to have gained general acceptance within the medical community. Rather,

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[54] *Id*. at 534.

[55] See *Krohn*, unpub op at 4. The Court of Appeals' reliance on *SPECT Imaging* was misplaced. In that case, the Court addressed whether a particular form of brain imaging was a reasonably necessary service under MCL 500.3107. *SPECT Imaging*, 246 Mich App at 574. The Court remanded for the trial court to conduct an evidentiary hearing to determine whether expert testimony and evidence relating to brain imaging were admissible under MRE 702. *Id*. at 578. The Court of Appeals did not require that brain imaging equipment be shown to have gained acceptance in the medical community. Rather, only the expert testimony or evidence offered in support of the brain imaging and the inferences therefrom had to have gained acceptance in the medical

an insured must present objective and verifiable medical evidence that medical treatment is efficacious in an injured person's care, recovery, or rehabilitation.[56] If there is objective and verifiable evidence that an experimental surgical procedure is efficacious, the finder of fact can begin to make an informed decision in regard to whether the treatment was reasonably necessary by considering whatever factors were relevant in that case, which may include but are not limited to the severity and chronicity of the condition, the outcomes of any previous treatments, the likelihood that alternative treatments would be efficacious, a personal physician's recommendation in conjunction with the patient's preference, and both the short-term and long-term risks and benefits.[57]

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community before brain SPECT imaging would be considered reasonably necessary under MCL 500.3107. *Id*. at 578-579. *SPECT Imaging* expressly stated that

> [i]f the court determines that the expert testimony and evidence relating to [brain] SPECT imaging satisfy the standards of MRE 702 and [the general-acceptance requirement], and are therefore admissible at trial, the ensuing determination, whether brain SPECT imaging was a reasonably necessary expense in the treatment of defendants' insureds pursuant to MCL 500.3107(1)(a), is a question reserved for the trier of fact. [*Id*. at 579.]

We reject the proposition that a proposed product, service, or accommodation must have gained general medical acceptance to be compensable.

[56] We emphasize that evidence of efficacy is not, by itself, sufficient in every case to establish reasonable necessity or no-fault liability; instead, our opinion makes clear that efficacy is a minimum threshold standard that, if demonstrated by a plaintiff, precludes judgment as a matter of law on this particular issue. As with threshold standards generally, efficacy as demonstrated through objective and verifiable medical evidence is merely the first step to proving liability when considering the unique facts and circumstances of each case.

[57] Notably, the parties' attorneys at trial elicited evidence in regard to several of these factors. Accordingly, we believe that attorneys of record are in the best position to propose factors that are most relevant to establishing whether a minimally efficacious treatment is "reasonably necessary."

Absent objective evidence to establish that the experimental surgical procedure is at least efficacious, there would not exist a material question of fact about whether the medical treatment was reasonably necessary to the care recovery or rehabilitation of an insured.[58]

We also observe that MRE 702 imposes an obligation on the trial court to ensure that any expert testimony or scientific evidence admitted at all stages of a proceeding is reliable.[59] "While the exercise of this gatekeeper role is within a court's discretion, a trial judge may neither 'abandon' this obligation nor 'perform the function inadequately.' "[60] The trial court must specifically ensure that expert testimony is based on sufficient facts or data, the product of reliable principles and methods, and that the witness has applied the principles and methods reliably to the facts of the case.

F. THE PROCEDURE WAS NOT REASONABLY NECESSARY FOR THE CARE, RECOVERY, OR REHABILITATION OF PLAINTIFF

In this case, plaintiff failed to present evidence to establish that the experimental surgical procedure at issue presented him with an objectively verifiable

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[58] This opinion does not in any way prevent no-fault insureds from themselves paying for procedures that are not "reasonably necessary" or entering into insurance contracts that provide broader coverage.

[59] *Edry v Adelman*, 486 Mich 634, 639-642; 786 NW2d 567 (2010). We have consistently held that medical issues raised in medical malpractice actions are not within the common experience and understanding of jurors, and they thus require the assistance of expert testimony. See, e.g., *Wilson v Stilwill*, 411 Mich 587, 611; 309 NW2d 898 (1981); see generally *Bryant*, 471 Mich 411; *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26; 594 NW2d 455 (1999).

[60] *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004) (citation omitted). In this case, however, defendant waived this issue by failing to object. *Craig v Oakwood Hosp*, 471 Mich 67, 82; 684 NW2d 296 (2004) (holding that "a party may waive any claim of error by failing to call this gatekeeping obligation to the court's attention").

chance that it would be efficacious in his care, recovery, or rehabilitation. Therefore, defendant was entitled to judgment as a matter of law because plaintiff did not meet the minimum threshold for recovery.

Plaintiff relied on the testimony of two expert witnesses, Dr. Hinderer of the RIM and Dr. Lima,[61] to establish that the procedure was "reasonably necessary." Dr. Hinderer's testimony cast doubt on whether the procedure was efficacious in plaintiff's care, recovery, or rehabilitation.[62] In particular, Dr. Hinderer did not endorse, recommend, or prescribe the procedure to plaintiff.[63] Dr. Hinderer testified that the procedure is

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[61] Dr. Lima is a neurologist, not a surgeon, and he did not participate in plaintiff's surgery. Dr. Lima, however, described himself as a member of plaintiff's surgical team.

[62] During oral argument, plaintiff's counsel conceded that, at best, Dr. Hinderer took a neutral stance with regard to the procedure. In light of this admission, Dr. Hinderer's testimony can hardly be found to support the conclusion that the procedure was reasonably necessary for plaintiff's care, recovery, or rehabilitation.

[63] Dr. Hinderer did testify that the procedure was approved by the "Geneva Protocol," which plaintiff claims is similar to FDA approval. We note that this was likely intended to be a reference to the Declaration of Geneva, which, together with the Declaration of Helsinki, governs the ethics of human medical research under principles set forth by the World Medical Association. See World Medical Association, WMA Declaration of Helsinki —Ethical Principles for Medical Research Involving Human Subjects, <http://www.wma.net/en/30publications/10policies/b3/index.html> (accessed July 20, 2011). In any event, Dr. Hinderer's testimony only addressed the "Geneva Protocol" in regard to whether it was safe and ethical for humans to undergo the procedure for purposes of research. In comparing the FDA's approval process to the "Geneva Protocol," Dr. Hinderer testified that the "FDA really is concerned about safety first and then efficacy, and the FDA does it in a staged set of approaches or phases, Phase [I] being a safety trial, Phase [II] being continued safety monitoring and early investigation of efficacy, Phase [III] being primarily focused on efficacy . . . ." Dr. Hinderer did not suggest that the "Geneva Protocol" had something comparable to Phase II FDA review for investigation of efficacy, or that the procedure had been reviewed for efficacy in any manner. In fact, Dr. Hinderer admitted

not regarded as necessary in his field of medicine and that "[i]t's certainly not standard of practice given its experimental nature." More importantly, when asked whether the surgical procedure increased the chances of an injured person's potential for recovery, Dr. Hinderer agreed with defense counsel's statement that "we don't know the outcomes yet because this is such a new procedure."

Further, Dr. Hinderer's testimony actually confirmed that the decision to undergo the procedure was purely subjective. He candidly testified that

> there are individuals who would not even remotely consider this procedure; there are others who don't even want to hear anything negative about it because they want to pursue it, and everything in between, so it—you know, relative to someone, you know, placing oneself in a situation like this, you know, it's a personal choice, but certainly understandable . . . .

Taken in the light most favorable to plaintiff, Dr. Hinderer's testimony does not provide any evidence that the experimental procedure presented plaintiff a medically verifiable chance that it would be efficacious in his care, recovery, or rehabilitation. Accordingly, Dr. Hinderer's testimony did not provide an objective basis from which a jury could conclude that the experimental surgical procedure was reasonably necessary.

Dr. Lima's testimony does not save plaintiff's claim.[64] Plaintiff maintains that the procedure afforded him the

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that he had not actually tried to compare the relative criteria of the "Geneva Protocol" and the phases of review preceding FDA approval.

[64] The dissent relies on Dr. Lima's testimony regarding the procedure's conformity with the European Commission's guidelines regarding clinical procedures. There was no evidence that these guidelines verify the efficacy of any given procedure. At most, these guidelines suggest that the procedure may be performed safely.

possibility or opportunity to recover as much function as possible below his injury site. Dr. Lima did indeed claim that the procedure was reasonably necessary if plaintiff wanted the opportunity to recover some function below the injury site. And plaintiff has clearly relied on Dr. Lima's affirmative answer to counsel's question whether, "as a result of the procedure, the possibility exists that [plaintiff] may regain some level of function below the injury site[.]"

This possibility, however, cannot be measured without objective evidence establishing efficacy in the first place. Further, as with the legal standard for establishing causation, the mere possibility of efficacy is not enough, and "when the matter remains one of pure speculation or conjecture, . . . it becomes the duty of the court to direct a verdict for the defendant."[65] While Dr. Lima articulated his theory, he failed to present medical evidence to support it. Whatever research he may have conducted, it was unsupported by any controlled studies, it had not been subjected to peer review, and the medical evidence had not been debated in scholarly publications. Dr. Lima did not base his testimony on any verifiable evidence that undergoing the procedure would be efficacious. The record reflects that his testimony, at best, reflects his personal belief, or hope, that many of the patients who undergo the procedure improve. This is clearly established by the fact that Dr. Lima was very "surprised" by the "quite unexpected" results of plaintiff's procedure. In sum, Dr. Lima's testimony also fails to provide an objective basis by which a jury could conclude that the experimental surgical procedure was reasonably necessary for plaintiff's care, recovery, or rehabilitation.[66]

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[65] *Weymers v Khera*, 454 Mich 639, 563 NW2d 647 (1997).

[66] Contrary to the dissent's assertion, we are not holding that plaintiff's subjective decision to undergo the procedure was unreasonable. Instead,

G. RESPONSE TO THE DISSENT

The dissent's declaration that "[t]oday's decision rewrites [MCL 500.3107] to require that a procedure be 'medically necessary' or 'medically appropriate' in order for an insured to be reimbursed by his or her insurer"[67] is patently false. Nowhere in this opinion, except in response to the dissent, will you find the phrases "medically necessary" or "medically appropriate." After falsely ascribing these standards to us, the dissent uses them to set up the straw-man argument that we are thwarting the will of the people by enacting standards that were rejected when 1993 PA 143 was rejected by referendum. This is also patently false.

1. WE ARE INTERPRETING MCL 500.3107

The dissent claims that our opinion adds language to MCL 500.3107. We obviously disagree with this characterization. We believe that the dissent fails to give meaning to the portion of the provision that states "for an injured person's care, recovery, or rehabilitation" by concluding that evidence of a treatment's efficaciousness is not required to prove that it is reasonably necessary. A treatment or procedure that has not been

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we are simply holding that because plaintiff presented no objective evidence that the procedure would have any beneficial effect on his "care, recovery, or rehabilitation," he failed to satisfy the requirement of MCL 500.3107(1)(a) that the procedure be "reasonably necessary [for his] care, recovery, or rehabilitation." Under *Nasser*, 435 Mich at 55, and this Court's more recent statement in *Wilcox v State Farm Mut Auto Ins Co*, 488 Mich 1011 (2010), we agree with the dissent that in "most cases" a jury is the proper vehicle to determine whether a procedure is reasonably necessary. However, as we hold here, medical treatment that lacks objective and verifiable evidence of efficacy cannot *ever* be considered "reasonably necessary," and thus the issue should be decided as a matter of law.

[67] *Post* at 188.

shown to be efficacious can be neither "reasonable" nor "necessary" under the no-fault act.

Our interpretation of MCL 500.3107 gives meaning to the phrase "reasonably necessary . . . for an injured person's care recovery or rehabilitation," and, in doing so, we define the minimum amount of evidence that must be presented on the question before the matter becomes a genuine and material question of fact sufficient to be submitted to a jury for its determination.[68] We merely conclude that the reasonably necessary standard cannot be met when there is no evidence that medical treatment will have any beneficial effect on the "injured person's care, recovery, or rehabilitation."

It is a bedrock legal principle that "[i]t is, emphatically, the province and duty of the judicial department, to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[69] This Court stated that "it is necessary . . . that the law shall be known and certain, and shall not depend on each jury that tries a cause."[70] It is axiomatic that courts decide questions of law and juries apply the law given them to the facts as they have found them. This principle is reflected in our model civil jury instructions, and the trial court instructed the jury

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[68] The dissent cites *Owens v Auto Club Ins Ass'n*, 444 Mich 314, 326; 506 NW2d 850 (1993), for the proposition that "an issue of fact still existed for the jury to resolve" "even if doubt was cast by one of the two assessing physicians . . . ." *Post* at 185. Unlike the situation in *Owens*, plaintiff's expert witnesses here either independently or cumulatively failed to testify that objective and verifiable evidence existed to establish that the experimental surgical procedure was efficacious, and therefore reasonably necessary to plaintiff's care, recovery, or rehabilitation. Because no evidence was presented by any expert to create a genuine issue of fact, the principles of *Owens* are not implicated by this case.

[69] *Marbury v Madison*, 5 US (1 Cranch) 137, 177; 2 L Ed 60 (1803).

[70] *Hamilton v People*, 29 Mich 173, 191 (1874).

consistently with those instructions.[71] We do not add language to MCL 500.3107(1)(a), but expound upon the phrase "reasonably necessary . . . for an injured person's care recovery or rehabilitation" to provide essential legal guidance.[72]

We find overwrought the dissent's protestations regarding the so-called "stringent" standard that the dissent claims this opinion articulates. Again, we merely hold that an insured must establish that medical treatment is efficacious in his or her care, recovery, or rehabilitation. We conclude that this standard is entirely consistent with the common meaning of the phrase "reasonably necessary . . . for an injured person's care, recovery, or rehabilitation." On the other hand, the dissent's position that a reasonably necessary treatment is any treatment that a person hopes could possibly work falls far short of any commonly accepted meaning of "reasonably necessary . . . for an injured person's care, recovery, or rehabilitation." The dissent's standard would allow a nonefficacious treatment—which is worthless—to be considered "reasonably necessary" for the sole reason that an expert witness offered an opinion that the medical treatment is rea-

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[71] See M Civ JI 2.01 ("You must take the law as I give it to you," and "Your responsibility as jurors is to decide what the facts of the case are.").

[72] As previously stated, outside the litigation context, the dissent's position provides absolutely no guidance for how to determine the issue of reasonable necessity. By providing meaning to MCL 500.3107, this opinion provides guidance to all members of the relevant community—insureds, insurance claims adjusters trying to determine whether a medical procedure is covered, lawyers, medical experts, and so forth—to know that, as with other personal protection insurance benefits, there must be objective and verifiable evidence of efficacy before coverage is contemplated under the no-fault act. We believe that all interested parties are better off knowing their responsibilities and liabilities before the necessity of litigation arises. The dissent's position provides no guidance whatsoever—not to the community generally, and not even to juries who must decide questions of "reasonable necessity."

sonably necessary. For the same reasons that we caution trial courts not to "admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert,"[73] we believe that what constitutes a reasonably necessary medical treatment cannot solely be based on the ipse dixit of a physician. And while we recognize that our standard, which requires evidence of efficacy, is more imposing than the dissent's standard of let the jury figure it out, it bears repeating that medical treatments, like *any* other personal protection insurance benefit, must be efficacious to be reasonably necessary. Ignoring this basic principle sanctions the dissent's anything-goes approach, whereby every insured's demand for payment would inexplicably become a question of fact and no-fault benefits would be paid for treatments not even shown to be reliable or effective, let alone reasonable or necessary.

2. 1993 PA 143

The dissent maintains that our interpretation of MCL 500.3107(1)(a) thwarts the will of the voters as expressed in the 1994 general election, in which the voters rejected 1993 PA 143. But, as explained earlier, in order to advance this argument, the dissent must ascribe to us legal standards not adopted in this opinion. Further, we are unfamiliar with a method of statutory interpretation that commences interpretation of an existing statute not by reviewing the words of that statute, but instead by examining the language of one rejected by referendum. Employing this method of interpretation, the dissent maintains that an experimental surgical procedure may never be deemed unreasonable as a matter of law and that a jury must always

[73] *Gilbert*, 470 Mich at 783, quoting *General Electric v Joiner*, 522 US 136, 146; 118 S Ct 512; 139 L Ed 2d 508 (1997).

determine what is reasonable and necessary, regardless of the evidence presented at trial.

1993 PA 143 would indeed have amended MCL 500.3107 to state in subsection (4)(c) that "[e]xpenses within personal protection insurance coverage shall not include experimental treatment or participation in research projects." But it defies logic to presume that because a total bar on experimental treatments was rejected by the voters, the reasonableness and necessity of all experimental treatments must be resolved by a jury. Following the dissent's reasoning, if a medical doctor opined that treatments such as apricot pit theory, ear candling, homeopathy, magnet therapy, and psychic surgery could possibly give an insured a chance to recover, a jury would have to resolve whether those treatments were reasonable and necessary to the care, recovery, or rehabilitation of the insured.[74] This could not possibly be the effect of the rejection of 1993 PA 143.

Further, [a]t least one Michigan court has declined to adopt the method of statutory construction adopted here by the dissent. In *Michigan Chiropractic Council v Office of Fin & Ins Servs Comm'r*,[75] the Court of Appeals was asked to assume that the rejection by ballot referendum of 1993 PA 143 amounted to a rejection by the voters of every single aspect of the act. The Court of Appeals did not accept this argument. The Court of Appeals observed that "1993 PA 143 made comprehensive changes to Michigan's no-fault insur-

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[74] Surely the dissent would not require an insurer to reimburse the cost of placebo pills. Yet, the dissent would hold that there remains a question of fact whether the experimental surgical procedure here is reasonably necessary, even though plaintiff presented no objective evidence that it has any more demonstrated efficacy than a placebo.

[75] *Michigan Chiropractic Council v Office of Fin & Ins Servs Comm'r*, 262 Mich App 228; 685 NW2d 428 (2004), vacated 475 Mich 363; 716 NW2d 561 (2006).

ance scheme. Because the referendum rejected the act in its entirety, it has little bearing on the [specific issue presented in] this case."[76] We agree with the *Chiropractic Council* panel that 1993 PA 143 was a comprehensive insurance reform bill, and one can only speculate whether the rejection of 1993 PA 143 signified that voters expected every type of experimental treatment to be covered under the no-fault act. Indeed, the language on the ballot proposal did not even mention experimental treatment.[77] The dissent engages in guesswork and, on this basis, believes that Michigan voters intended its courts to rubber-stamp all determinations under the

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[76] *Chiropractic Council*, 262 Mich App at 246 n 12.

[77] The official ballot language stated:

PROPOSAL C

A REFERENDUM ON PUBLIC ACT 143 OF 1993—AN AMENDMENT TO MICHIGAN'S AUTO INSURANCE LAWS

Public Act 143 of 1993 would:

1.) Reduce auto insurance rates by 16% (average) for six months for policyholders reducing personal injury (medical) insurance to $1 million. Extra coverage made available at added cost.

2.) Permit Insurance Commissioner to waive company's obligation to reduce rates if statutory formula would be in excess of 1989-1992 state average.

3.) Place limits on personal injury (medical) benefits.

4.) Limit fees paid to health care providers.

5.) Limit right to sue by setting higher standards for the recovery of damages for "pain and suffering" and prevent uninsured drivers and drivers over 50% at fault from collecting damages.

6.) Allow rate reductions for accident-free driving with the same insurer.

no-fault act, regardless of the paucity of evidence supporting a jury's finding and regardless of how unreasonable and unnecessary the expense may be. We base our opinion on the current law. We do not base it on what the law once was or could have been.

This case does not turn on any aspect of 1993 PA 143. As already stated, we reject defendant's claim that plaintiff cannot prevail merely because the procedure was experimental. We also reject the Court of Appeals' holding that an insured is required to prove that an experimental surgical procedure has gained general acceptance in the medical community before consideration by the trier of fact. The question whether an experimental treatment is reasonably necessary for an insured's care, recovery, or rehabilitation must be resolved by a fact-finder if the insured can present objective and verifiable medical evidence to support the conclusion that the treatment is efficacious. The dissent maintains that this is an illusory standard because, if objective and verifiable medical evidence of efficacy exists, "it is unclear how the procedure would still be termed 'experimental' or in the 'research' phase."[78] But the practices of the FDA establish that an efficacious treatment may nonetheless be experimental. The FDA has three phases of testing before a medical procedure or product receives full FDA approval. Phases II and III of the FDA process, in which the treatment is still experimental or in the research phase, focus on efficacy. This is but one example. And contrary to the dissent's representation, we do not hold that the objective and verifiable medical evidence must include "controlled studies subject to peer review or scholarly publications" supporting the science behind the surgery.[79] Likewise,

[78] *Post* at 190.

[79] *Post* at 189.

we are in no way suggesting that data from the FDA are required. Rather, these are additional examples of objective and verifiable evidence that can establish efficacy. Presentation by an expert witness of any of this objective and verifiable evidence, even if opposed by several witnesses claiming the proposed medical treatment is not efficacious, is sufficient to sustain plaintiff's burden. Since we are not medical experts, we are not going to artificially limit the types of objective and verifiable evidence that a party may present to support its claim; instead, we simply note that there must be some evidence from the medical community that a particular procedure would have some beneficial effect on a person's "care, recovery, or rehabilitation" in accordance with MCL 500.3107(1)(a).

IV. CONCLUSION

We conclude that the question whether a product, service or accommodation is reasonably necessary for an injured person's care, recovery, or rehabilitation must be determined under an objective standard. We further conclude that when medical treatment is experimental, an insured seeking reimbursement for this treatment must present objective and verifiable medical evidence establishing that the treatment is efficacious. A treatment or procedure that has not been shown to be efficacious cannot be reasonable or necessary under the no-fault act. An insured's subjective belief that medical treatment is efficacious, reasonable, and necessary is not sufficient to create a question of fact. Viewed in the light most favorable to plaintiff, the objective and verifiable medical evidence presented at trial failed to establish that the experimental surgical procedure at issue in this case was any way efficacious in the care, recovery, or rehabili-

tation of plaintiff's injury.[80] Accordingly, we affirm the judgment of the Court of Appeals.

YOUNG, C.J., and MARKMAN and MARY BETH KELLY, JJ., concurred with ZAHRA, J.

HATHAWAY, J. (*dissenting*). This case addresses whether a medical procedure performed on plaintiff to treat his severe accident-related spinal-cord injuries was "reasonably necessary" under MCL 500.3107(1)(a) of the no-fault act, MCL 500.3101 *et seq*. The majority holds that the procedure was not "reasonably necessary" and, in doing so, adds language to the no-fault act that was rejected by ballot referendum in 1994. The majority reaches its result by erroneously removing the determination of which expenses are "reasonably necessary" from the jury. Additionally, the majority's new judicially crafted definition of "reasonably necessary" elevates the standard for proving that treatment is "reasonably necessary" to one that is more stringent than MCL 500.3107(1)(a) requires. I respectfully dissent because today's decision erroneously changes the mandates of the no-fault act and replaces them with standards that are inconsistent with the language and history of that act. I would apply the statute as written and uphold the jury's finding that the procedure performed on plaintiff was "reasonably necessary." Therefore, I would reverse the Court of Appeals' judgment and hold that plaintiff is entitled to reimbursement of the costs associated with the procedure.

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[80] Because we hold that plaintiff cannot demonstrate that the procedure was "reasonably necessary" to his care, recovery, or rehabilitation, we need not address defendant's alternative argument that the procedure was not "lawfully rendered" and therefore not compensable under the no-fault act.

This case involves plaintiff's request that his no-fault insurer, defendant Home-Owners Insurance Company, reimburse him for the expenses surrounding an experimental procedure that he underwent in Portugal. The procedure was performed to treat the serious spinal-cord injuries plaintiff had sustained in a motorcycle accident. The accident left plaintiff a paraplegic with no sensation in or control of his lower body, leaving him confined to a wheelchair and in need of assistance in urinating and defecating. His condition showed no improvement during the four years between his accident and the procedure. According to plaintiff's expert witness, plaintiff's condition improved following the procedure. However, defendant refused to pay for the procedure, arguing that it was not "reasonably necessary" for plaintiff's "care, recovery, or rehabilitation"[1] because it was experimental in nature.

During his jury trial, plaintiff presented testimony from Dr. Carlos Lima, a neurologist on the surgical team that performed the procedure. Dr. Lima testified that the procedure involved harvesting tissue containing stem cells from plaintiff's own sinus cavities and transplanting the tissue into the injured area of the spinal cord. Dr. Lima testified that this procedure fosters growth of new cells in the injured spinal cord, while avoiding the ethical and technical issues surrounding the use of embryonic stem cells. Although the procedure had not been presented for approval by the federal Food and Drug Administration (FDA), Dr. Lima testified that it was conducted within the standards of the European Commission's guidelines regarding clinical procedures. The procedure was performed in a governmental hospital in Lisbon, Portugal, after the presiding physician had obtained approval from the hospital board. Dr. Lima testified that of the 110 patients who

[1] MCL 500.3107(1)(a).

had undergone the treatment in his program, a majority of the patients showed improvement. Dr. Lima's testimony describing the success of the procedure included the following:

> *Q*. Have you had patients who have undergone this stem cell surgery recover their ability to walk?
>
> *A*. Not unassisted, but we have—and this is rule [sic] now for our patients to be walking assisted with a walker. That's the rule now for our patients.
>
> *Q*. Have some of your patients recovered movement below the injury site after this surgery?
>
> *A*. Yes.
>
> *Q*. Have some of the patients shown improvement in sensation below the injury site?
>
> *A*. Yes.
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> * * *
>
> *Q*. Overall, would you describe—how would you describe the degree of success of the surgeries on patients?
>
> *A*. Well, maybe I'm not right person to say that, and that's why we want to publish the whole results of the patient, but I would say the majority of patients have some kind of improvement.

Plaintiff's treating doctor in the United States, Dr. Steven Hinderer, also testified concerning the reasonableness of the procedure, and responded to questioning as follows:

> *Q*. And based on everything you know about this surgery and in light of [plaintiff's] injury and with your experience with all the other patients that have undergone this surgery, did you consider it a reasonable form of treatment for [plaintiff] to have this surgery if his objective was to try to increase his recovery below the injury site?
>
> * * *
>
> *A*. Yes.

The jury found that the expenses related to the surgery in Portugal were reasonable charges for reasonably necessary products, services, and accommodations for plaintiff's care, recovery, and rehabilitation under the no-fault act. The Court of Appeals, however, reversed the jury's finding and ordered the trial court to enter a judgment in defendant's favor.[2] Plaintiff now appeals that decision.

The issue before this Court is whether an experimental medical procedure can be "reasonably necessary" for an injured person's care, recovery, or rehabilitation.[3] Deciding this issue requires application of MCL 500.3107(1)(a).

When interpreting a statute, we follow the established rules of statutory construction. The purpose of statutory construction is to discern and give effect to

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[2] *Krohn v Home-Owners Ins Co*, unpublished opinion per curiam of the Court of Appeals, issued January 26, 2010 (Docket No. 283862), p 6.

[3] Defendant also argues that the treatment was not "lawfully rendered" under MCL 500.3157 of the no-fault act because the procedure performed on plaintiff in Portugal has not been approved in the United States by the FDA. MCL 500.3157 provides in pertinent part that "[a] physician, hospital, clinic or other person or institution lawfully rendering treatment to an injured person for an accidental bodily injury covered by personal protection insurance . . . may charge a reasonable amount for the products, services and accommodations rendered."

In this case, I believe that the procedure was likely "lawfully rendered" because it was lawful in Portugal, where it was performed. Therefore, I find persuasive the Court of Appeals dissent's conclusion that adopting defendant's position would require that the statute would have to "be rewritten to provide coverage for treatment 'lawfully rendered in the U.S. and approved by the FDA.' " *Krohn*, unpub op at 10 (FORT HOOD, J., dissenting). Because the Legislature did not incorporate such language into the statute, it appears that the procedure was "lawfully rendered" under MCL 500.3157 because it was lawful in Portugal. However, because the majority does not opine on this argument, I do not find it necessary to consider this argument in detail in this dissent.

the intent of the Legislature.[4] In doing so, we first look to the actual language of the statute.[5] If a statute is clear and unambiguous, it must be enforced as written and no further judicial construction is allowed.[6] Simply stated, we must avoid a construction that would render any part of the statute nugatory,[7] and similarly, we are "not free to add language to a statute or to interpret a statute on the basis of this Court's own sense of how the statute should have been written."[8] Further, a statute must be read as a whole,[9] and while individual words and phrases are important, the words and phrases should be read in the context of the entire legislative scheme.[10] And "when courts interpret the no-fault act in particular, they are to remember that the act is remedial in nature and must be liberally construed in favor of the persons intended to benefit from it."[11]

The statute at issue, MCL 500.3107(1), provides in pertinent part:

> (1) Except as provided in subsection (2), personal protection insurance benefits are payable for the following:
>
> (a) Allowable expenses consisting of all reasonable charges incurred for reasonably necessary products, ser-

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[4] *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[5] *Id.*

[6] *Sun Valley*, 460 Mich at 236.

[7] *People v McGraw*, 484 Mich 120, 126; 771 NW2d 655 (2009), citing *Baker v Gen Motors Corp*, 409 Mich 639, 665; 297 NW2d 387 (1980).

[8] *Kirkaldy v Rim*, 478 Mich 581, 587; 734 NW2d 201 (2007) (CAVANAGH, J., concurring).

[9] See *Sun Valley*, 460 Mich at 237.

[10] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

[11] *Turner v Auto Club Ins Ass'n*, 448 Mich 22, 28; 528 NW2d 681 (1995), citing *Gobler v Auto-Owners Ins Co*, 428 Mich 51, 61; 404 NW2d 199 (1987).

> vices and accommodations for an injured person's care, recovery, or rehabilitation. Allowable expenses within personal protection insurance coverage shall not include charges for a hospital room in excess of a reasonable and customary charge for semiprivate accommodations except if the injured person requires special or intensive care, or for funeral and burial expenses in the amount set forth in the policy which shall not be less than $1,750.00 or more than $5,000.00.

The majority holds that in order for an expense related to an experimental surgical procedure to be "reasonably necessary," a court must first determine as a matter of law that there is "objective and verifiable medical evidence establishing that [the experimental surgical procedure] is efficacious."[12] Further, the majority holds that plaintiff did not meet the "objective and verifiable medical evidence" standard because Dr. Lima's research "was unsupported by any controlled studies, it was not subject to peer review, and the medical evidence was not debated in scholarly publications."[13] Thus, the majority's new standards add language to the statute that is simply not there.

In this case, there was testimony from two doctors who assessed plaintiff's condition before the procedure was performed. Dr. Lima testified that it would be necessary for plaintiff to undergo the procedure in order to have a chance at recovery. Dr. Hinderer did state that he was not able to recommend the procedure to plaintiff because the procedure was not an authorized procedure in the United States, but he also testified that the procedure was a reasonable form of treatment for plaintiff. The majority characterizes Dr. Hinderer's testimony as casting doubt on the efficacy of the procedure because "Dr. Hinderer did not endorse,

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[12] *Ante* at 148.

[13] *Ante* at 170.

recommend, or prescribe the procedure to plaintiff."[14] This characterization is erroneous.

The majority dismisses the fact that the facility where plaintiff was treated by Dr. Hinderer, the Rehabilitation Institute of Michigan, has a professional relationship with Dr. Lima's program in Portugal pursuant to which the Rehabilitation Institute screens patients to determine whether they meet the criteria to be eligible for the procedure. Dr. Lima's program has performed the procedure on 110 patients from around the world. According to Dr. Lima, the Rehabilitation Institute has screened nearly 60 patients for the procedure. Of the 60 patients from the Rehabilitation Institute, 40 were Dr. Hinderer's patients. Thus, I disagree with the majority's assertion that Dr. Hinderer cast doubt on the efficacy of the procedure. More than a third of the patients in the worldwide program were patients of Dr. Hinderer, which, when viewed in a light most favorable to the plaintiff,[15] suggests that Dr. Hinderer does not doubt the effectiveness of the procedure. However, even if doubt was cast by one of the two assessing physicians, an issue of fact still existed for the jury to resolve under *Owens v Auto Club Ins Ass'n*, 444 Mich 314, 326; 506 NW2d 850 (1993).[16] Today's decision erroneously holds that the jury should not have decided this genuine issue of material fact.

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[14] *Ante* at 168.

[15] This case involves defendant's motion for a directed verdict. "The standard of review for judgments notwithstanding the verdict requires review of the evidence and all legitimate inferences in the light most favorable to the nonmoving party." *Orzel v Scott Drug Co*, 449 Mich 550, 557; 537 NW2d 208 (1995), citing *Wadsworth v New York Life Ins*, 349 Mich 240; 84 NW2d 513 (1957).

[16] *Owens* held that the presentation of competing professional opinions from doctors who assessed the plaintiff is enough to create a question of fact regarding whether the procedure was "reasonably necessary." *Owens*, 444 Mich at 326.

The majority holds that the jury incorrectly concluded that the procedure was "reasonably necessary." In reaching this result, the majority disregards much of the actual testimony presented.[17] For instance, Dr. Lima testified that without the procedure, "there's no possibility for [plaintiff] to have any recovery with such [an injury] which is not just functionally complete, but it was anatomically very destructive and complete also." Dr. Lima's statement shows that a doctor who assessed plaintiff's condition found that there was no possibility of recovery before the procedure.

The majority argues that Dr. Lima's testimony suggests merely "the possibility or opportunity to recover" and that a "possibility . . . cannot be measured without objective evidence establishing efficacy in the first place."[18] This argument is at odds with the actual language of MCL 500.3107(1)(a) because it contains standards not found in the language of the statute. The statute only requires a procedure to be "reasonably necessary" to qualify as an allowable expense. Therefore, the analysis should be limited to whether a procedure was "reasonably necessary" under the commonly understood meaning of those words.[19] The statute does

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[17] While the majority acknowledges that Dr. Lima testified that he "would say the majority of patients showed some improvement," the majority mischaracterizes this testimony as a "guess" that "hardly demonstrates that a 'majority of patients showed improvement.' " *Ante* at 153 n 5. However, as the actual testimony illustrates, the majority's characterization of these facts is not supported by the record. Further, the jury apparently disagreed with the majority's characterization of Dr. Lima's statements.

[18] *Ante* at 170.

[19] "Reasonable" is defined as "1. Capable of reasoning; *rational*. 2. Governed by or in accordance with reason or *sound thinking*. 3. Within the bounds of *common sense*[.]" *The American Heritage Dictionary of the English Language, New College Edition* (1981) (emphasis added). "Necessary" is defined as "1. Needed for the continuing existence or function-

not contain any language limiting the basis of a "reasonably necessary" determination to objective and verifiable medical data, as is required by today's decision.

The majority also errs because it misconstrues the meaning of the term "reasonably necessary." Without any statutory support, it interprets the word "reasonably" to mean "objective and verifiable." The majority then declares that the term "necessary" creates a strict standard requiring "evidence" of "efficacy."[20] The evi-

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ing of something; essential; indispensible . . . . 2. *Needed to achieve a certain result or effect*; requisite: *the necessary tools*." *Id.* (emphasis added). When the two terms are read together, "reasonably necessary" indicates something that is essential and proper under the circumstances.

The majority rejects my analysis, claiming that it offers no legal standard for determining whether a procedure is "reasonably necessary" under MCL 500.3107(1)(a). However, as remains clear throughout my analysis, this dissent merely applies our rules of statutory interpretation, which require that these words be given their common meaning when the statute does not provide a technical definition for them. MCL 8.3a. Thus, the majority's accusation is devoid of merit, given that I conclude that the determination should be based on the commonly understood meaning of the words "reasonable" and "necessary," rather than injecting a statutorily unsupported requirement that the procedure be "medically" reasonably necessary.

Thus, I would hold that, as used in MCL 500.3107(1)(a), a procedure is "reasonably necessary" if a reasonable person would conclude that the procedure is a "necessary" tool for the "injured person's care, recovery, or rehabilitation." And, as discussed in this dissent, in most cases a jury is in the best position to apply the common sense necessary to make this determination, and can make that determination using a number of factors. It is clear that applying the commonly understood meaning of the statutory phrase "reasonably necessary" is more consistent with the legislative intent and does provide ample guidance to parties and courts.

[20] Turning the "reasonably necessary" standard into one that requires objective and verifiable proof of efficacy may prove troubling for this Court in future cases, considering that the "reasonably necessary" standard appears in more than 100 Michigan statutes, our court rules, and the Michigan Rules of Professional Conduct. For example, will the majority's new standard for "reasonably necessary" apply in cases

dence that the majority refers to can only be satisfied with thorough evidence from the "medical community."[21] However, the statute before us does not contain the terms "objective," "verifiable," "evidence," "efficacy," or "medical community."

Under the majority's own stated principle, words cannot be read into this statute. In order to provide support for the majority's new standard, the statute would have to contain, at a minimum, language indicating that expenses are only allowable if they relate to procedures that are "proven to be efficacious by the medical community or the FDA." However, such language is not in the no-fault act. For all practical purposes, this is a "medically necessary" or "medically appropriate" standard, despite the majority's statements to the contrary. Thus, today's decision rewrites the statute to require that a procedure be "medically necessary" or "medically appropriate" in order for an insured to be reimbursed by his or her insurer.

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regarding revenue sharing, MCL 141.913b(3), regional convention facilities, MCL 141.1369(10)(d), the tender of goods, MCL 440.2503(1)(a), funds transfers, MCL 440.4802(1)(b), dealer agreements with auto manufacturers, MCL 445.1575(2), nonprofit corporations, MCL 450.2443(2)(c), churches, MCL 458.257, cooperative savings associations, MCL 491.314, airport facilities, MCL 259.118(3)(c), farm produce fees, MCL 285.321(5), the competence of a criminal defendant, MCL 330.2020(1), water and sewer board decisions, MCL 333.12713(2), the application of the rules of evidence, MRE 803(4), and attorney misconduct, MRPC 1.6(c)(3)?

[21] The majority disregards the testimony concerning the success of other patients in Dr. Lima's clinical program. As noted, the majority states that "[w]hatever research he may have conducted, it was unsupported by any controlled studies, it had not been subjected to peer review, and the medical evidence had not been debated in scholarly publications." *Ante* at 170. Thus, under the majority's test requiring evidence proving the efficacy of the procedure, the standard is a heightened standard that cannot be met with a minimal threshold of supporting evidence, even when there is no evidence presented disproving the effectiveness of the procedure.

In response to this criticism, the majority proclaims that nowhere in its opinion does it use the phrases "medically necessary" or "medically appropriate," except in its response to this dissent. But the majority need not invoke those magic words for it to be obvious to all that this is precisely what the majority's new standard requires. A standard that requires the presentation of objective and verifiable medical evidence establishing that a treatment is generally efficacious, based on controlled studies subject to peer review or scholarly publications, *is* a "medically necessary" standard. The majority's statements to the contrary do not change the practical reality of its new standard.

In reviewing the actual language of the statute, it is clear that the determination of whether a procedure is "reasonably necessary" involves analyzing whether the decision to undergo the procedure was within reason, in light of the testimony that plaintiff *would not recover* if he did nothing.[22] Moreover, it must not be forgotten that a jury of plaintiff's peers found that the procedure was "reasonably necessary" for plaintiff's "care, recovery, and rehabilitation." By making this broad decision today, the majority has turned a procedure that was found to be "reasonably necessary" for plaintiff's "care, recovery, or rehabilitation" into an unreasonable choice. In this case, the majority effectively asserts that it was unreasonable as a matter of law for this plaintiff to have pursued the only procedure that could possibly prevent him from being a paraplegic for the rest of his life.

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[22] See *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 548; 697 NW2d 895 (2005) (MARILYN KELLY, J., dissenting) ("Given the wide variety of circumstances under which injured parties seek no-fault benefits, the act provides for wide latitude in determining what benefits are reasonably necessary in a given situation.").

Further, the majority states that "[t]he ultimate question whether the surgical procedure at issue here is a covered expense under the no-fault act does not turn on its status as experimental."[23] However, despite this statement, experimental procedures and participation in research projects are effectively excluded from coverage as a matter of law under the majority's new standard. The majority's standard requires objective and verifiable medical evidence proving a procedure's efficacy, but if such data were to exist, it is unclear how the procedure would still be termed "experimental" or in the "research" phase.

Despite the majority's protestations to the contrary, its decision today also abandons well-established precedent. In *Nasser v Auto Club Ins Ass'n*, 435 Mich 33, 54; 457 NW2d 637 (1990), this Court stated that "the question of whether expenses are reasonable and reasonably necessary is generally one of fact for the jury" and that summary disposition should only be granted when the reasonableness and necessity of a procedure can be determined with "certainty" when the evidence is viewed in the light most favorable to the nonmoving party.[24] In *Owens*, 444 Mich at 326, this Court stated that the presentation of competing professional opinions from doctors who assessed the plaintiff was enough to create a question of fact regarding whether the

[23] *Ante* at 158-159.

[24] Citation and quotation marks omitted. *Nasser* instructed courts that unless it can be said "with certainty" that an expense was or was not "reasonably necessary," it is inappropriate to decide that issue as a matter of law. In other words, *Nasser* clearly stands for the proposition that only in rare cases will this issue be decided as a matter of law. Thus, the majority's efforts to "expound upon the phrase 'reasonably necessary' " in order to purportedly "provide essential legal guidance," are unnecessary. Rather than being "entirely consistent with" and "providing further guidance along" the lines of *Nasser*, the majority opinion borders on overruling it.

procedure was "reasonably necessary." Rather than following existing precedent and holding that the determination of whether a procedure is "reasonably necessary" is one for the jury, the majority transforms this question into a question of law.

Today's decision is particularly troubling given that, as recently as December 2010, a majority of this Court clarified a Court of Appeals remand order that had stated " '[w]hether a cost constitutes an allowable expense is a question of law and so it is to be determined by the court, not the jury.' " *Wilcox v State Farm Mut Auto Ins Co*, 488 Mich 1011 (2010). This Court's clarifying order instructed that

> [a]lthough whether an expense constitutes an "allowable expense" under MCL 500.3107(1)(a) is generally a question of law for the court, *Griffith v State Farm Mut Auto Ins Co*, 472 Mich 521, 525-526; 697 NW2d 895 (2005), "the question whether expenses are reasonable and reasonably necessary is generally one of fact for the jury," *Nasser* [435 Mich at 55]. Therefore, to the extent that there are material questions of fact pertaining to whether the expenses in this case are reasonable and reasonably necessary, these questions of fact must be decided by a jury. [*Id*. at 1011.]

In light of this Court's recent decision in *Wilcox*, it is unclear why it is suddenly necessary to change the way that "reasonably necessary" is decided. How has this Court's precedent become so unclear in such a short time? Why must this Court now effectively reverse the instructions in *Wilcox* and disregard *Nasser*?

Finally, perhaps the most significant evidence that the majority errs is that the Legislature enacted a bill

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Instead of taking the majority's approach, I would adhere to precedent and leave what is generally a question of fact to the jury, where it properly belongs. In holding otherwise, the majority usurps the role of the Legislature and the jury.

inserting language similar to that which the majority adds to the statute today, and the voters of this state rejected it by referendum. In 1993 PA 143, the Legislature amended the no-fault act, creating a standard to determine allowable expenses similar to the standard that the majority has adopted today.[25] MCL 500.3107(1), as amended by 1993 PA 143, stated:

> (1) Except as provided in subsection (3), personal protection benefits are payable for the following:
>
> (a) Allowable expenses that, for policies issued or renewed on after 120 days after the effective date of the amendatory act that added subsection (7), are as provided in subparagraphs (i) and (ii), incurred for *medically appropriate* products, services, and accommodations for an injured person's care, recovery, or rehabilitation. For policies issued or renewed on or after 120 days after the effective date of the amendatory act that added subsection (7) and on forms approved by the commissioner, an insurer shall offer the following coverages and an insured shall select in writing 1 of the following coverages:
>
> (i) Coverage for allowable expenses consisting of all reasonable charges incurred up to a maximum of $1,000,000.00 for *medically appropriate* products, services, and accommodations for an injured person's care, recovery, or rehabilitation . . . .
>
> (ii) Coverage for allowable expenses consisting of all reasonable charges incurred up to $2,000,000.00, $3,000,000.00, $4,000,000.00, or $5,000,000.00 maximums as selected by the insured, and the insurer may offer additional coverage limits, for *medically appropriate* prod-

[25] The Legislature enacted 1993 PA 143, and Governor John Engler signed it into law on August 6, 1993. The bill was set to go into effect on April 1, 1994. Before April 1, however, a petition for referendum was filed containing the required number of valid signatures to place the referendum on the ballot. When the petition was filed, 1993 PA 143 was suspended for the referendum vote. *Farm Bureau Mut Ins Co of Mich v Ins Comm'r*, 204 Mich App 361; 514 NW2d 547 (1994).

ucts, services, and accommodations for an injured person's care, recovery, or rehabilitation . . . . [Emphasis added.]

Additionally, MCL 500.3107(4), as added by 1993 PA 143, stated in pertinent part:

As used in this section:

(a) *Medically appropriate products, services, and accommodations* rendered or prescribed by a health care facility or health care provider *are those that are medically necessary . . . . Under no circumstances shall an insurer be required to provide coverage for any product, service, or accommodation that is not medically appropriate and medically necessary for an injured person's care, recovery, or rehabilitation* and reasonably likely to provide continued effectiveness with respect to the injured person's care, recovery, or rehabilitation. . . . Each insurer shall designate a person with whom providers can discuss insurer determinations of what is medically appropriate and medically necessary. *Disputes over reasonable charges and medically appropriate and medically necessary products, services, and accommodations shall be a question of law to be decided by the court.*

* * *

(c) Expenses within personal protection insurance coverage *shall not include experimental treatment or participation in research projects*. [Emphasis added.]

In November 1994, Proposal C asked the voters of this state to consider whether the amended requirements imposed by 1993 PA 143 embodied what the law of this state ought to be. In the referendum, Michigan voters overwhelmingly answered "No."[26] Thus, the citizens of Michigan expressly rejected a "medically necessary or medically appropriate" standard, a requirement

[26] 60.85 percent voted to reject the enactment of 1993 PA 143. 39.15 percent voted to accept the enactment. See Michigan Manual 1995-1996, p 955.

that disputes be decided by courts as a question of law, and, most significantly, a prohibition against coverage for "experimental treatment or participation in research projects."[27]

Despite the voters' rejections of these three elements, today's decision inserts them into the no-fault act. The majority argues that, because 1993 PA 143 attempted to broadly reform the no-fault system with numerous changes to MCL 500.3107, it is somehow unclear whether the voters actually rejected the specific reforms that the majority judicially enacts today.[28] This reasoning is misguided and illogical.

First, it is improper for this Court to insert elements of a rejected law into a statute because such action amounts to judicial engineering of a statute. The voters spoke on 1993 PA 143 in Proposal C, the Legislature has not chosen to subsequently add these three rejected elements into the no-fault act, and it is wrong for the majority to do so today. Most importantly, Const 1963, art 2, § 9 states that "[n]o law as to which the power of referendum properly has been invoked shall be effective

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[27] Proposal C was not the first time the voters rejected attempts by the Legislature to change the mandates of the no-fault act. In November 1992, the Legislature placed a proposal on the ballot, by initiative petition, that would, among other changes to the no-fault act, have placed certain caps on no-fault benefits. Proposal D of 1992 was also soundly rejected, with 62.6 percent of voters voting against the initiative and 37.4 percent of voters voting for the initiative. See Michigan Manual 1993-1994, p 878. Because the voters have said "No" to the only two attempts by the Legislature to reform the no-fault act, it is clear that the majority of voters want the no-fault act the way it is, without changes.

[28] The majority attempts to bolster this argument by citing the Court of Appeals' opinion in *Michigan Chiropractic Council v Office of Fin &Ins Servs Comm'r*, 262 Mich App 228; 685 NW2d 428 (2004), vacated 475 Mich 363 (2006). However, this Court vacated that opinion for lack of justiciability, meaning that the issues in the case were improperly before the Court. Accordingly, I do not find the majority's citation persuasive.

thereafter unless approved by a majority of the electors voting thereon at the next general election."

Second, it is disingenuous to argue that there is no way to determine which specific element of the law the voters rejected. The voters rejected the entire law. Plain and simple, the voters said "No." Thus, it borders on nonsensical for this Court to argue that the voters only disagreed with specific elements of the act and that we do not know which elements. A referendum vote, such as that taken on Proposal C, is an all-or-nothing vote, and, with respect to what voters wanted added to the no-fault act, the voters chose *nothing*.[29]

Moreover, the majority fails to recognize the unique importance of referenda. As Justice RILEY stated in *In re Executive Message from the Governor*, 444 Mich 1214 (1994):

> In the State of Michigan, "[a]ll political power is inherent in the people. Government is instituted for their equal benefit, security and protection." Const 1963, art 1, § 1. In accordance with this fundamental maxim of republican government, "[t]he people reserve to themselves the power to propose laws and to enact and reject laws, called the initiative, and the power to approve or reject laws enacted by the legislature, called the referendum." Const 1963, art 2, § 9. Such power is necessary to check the legislative branch of government when it either abuses its power or fails to heed the wishes of its constituency. See, e.g., *Kuhn* v *Dep't of Treasury*, 384 Mich 378, 385 [183 NW2d 796]

[29] The majority mischaracterizes my opinion, claiming that I believe that "Michigan voters intended its courts to rubber-stamp all determinations under the no-fault act . . . ." *Ante* at 176-177. This is a gross overstatement of my much narrower point. The point of my argument is that the voters' rejection of 1993 PA 143, which contained essentially the *same* standard that the majority adopts today, indicates both that the voters did not want to adopt a "medically appropriate" standard and that, by inference, "reasonably necessary" is a lower standard than "medically appropriate."

(1971). The importance of the referendum is so vital that "[n]o law as to which the power of referendum properly has been invoked shall be effective thereafter unless approved by a majority of the electors voting thereon at the next general election." Const 1963, art 2, § 9.

Thus, the majority's decision today is in direct conflict with the will of the voters of this state.

The pertinent part of the statute only uses the phrase "reasonably necessary" and specifies that the procedure must be for the "injured person's care, recovery, or rehabilitation." As noted earlier, if there is any factual dispute about whether a treatment is "reasonably necessary," that dispute must properly be decided by a jury. Rather than focusing on one factor, such as objective and verifiable medical evidence establishing the efficacy of the procedure, a determination by the jury could include an analysis of any number of factors. Such factors could include medical professionals' conclusions regarding the reasonable necessity of a procedure, lay persons' conclusions regarding the reasonable necessity of a procedure, scientific support for the effectiveness of a procedure, or possibly even the subjective belief of the plaintiff. The point, however, is that it is up to the jury, on a case-by-case basis, to decide what is reasonable or unreasonable. Michigan's Constitution affords parties "[t]he right of trial by jury . . . ."[30] This Court should not disregard the important fact-finding role of the jury. This Court must respect the no-fault act as it is currently written.

CONCLUSION

Today's decision rewrites the requirements for an insurer to pay allowable expenses under MCL 500.3107

[30] Const 1963, art 1, § 14.

of Michigan's no-fault act. The majority holds that the procedure in this case was not "reasonably necessary" and, in doing so, adds language to the no-fault act that was rejected by referendum in 1994. The majority reaches its result by erroneously removing the determination of which expenses are "reasonably necessary" from the jury. Additionally, the majority's new judicially crafted definition of "reasonably necessary" elevates the standard for proving that treatment is "reasonably necessary" to one that is more stringent than MCL 500.3107(1)(a) requires. I would apply the no-fault act as written, I would uphold the jury's finding in this case that the procedure performed on plaintiff was "reasonably necessary," and I would hold that plaintiff is entitled to reimbursement of the costs associated with the procedure. Accordingly, I dissent.

CAVANAGH (except for footnote 20) and MARILYN KELLY, JJ., concurred with HATHAWAY, J.

DUFFY v DEPARTMENT OF NATURAL RESOURCES

Docket No. 140937. Argued March 8, 2011 (Calendar No. 2). Decided July 30, 2011.

Beverly Duffy brought an action in the Court of Claims against the state of Michigan and the Department of Natural Resources to recover damages for injuries she sustained when her off-road vehicle struck a partially buried wooden board on the Little Manistee Trail. Plaintiff alleged that defendants had breached their duty to maintain the Little Manistee Trail in reasonable repair under the highway exception to governmental immunity from tort liability, MCL 691.1402(1). Defendants moved for summary disposition under MCR 2.116(C)(7). The court, William E. Collette, J., denied the motion, and defendants appealed. The Court of Appeals, SERVITTO, P.J., and BANDSTRA and FORT HOOD, JJ., reversed and remanded in an unpublished opinion per curiam, issued March 9, 2010 (Docket No. 289644), holding that all trailways are excluded from the scope of defendants' duties under the highway exception. The Supreme Court granted plaintiff's application for leave to appeal. 488 Mich 861 (2010).

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices MARY BETH KELLY and ZAHRA, the Supreme Court *held*:

The Little Manistee Trail is properly classified as a trailway within the distinct meaning of that word in Michigan's statutory law, but because it is not a trailway "on the highway," it is not a trailway covered under MCL 691.1401(e) and is thus not a highway for purposes of the highway exception to governmental immunity from tort liability.

1. The governmental tort liability act (GTLA), MCL 691.1401 *et seq*., shields a governmental agency from tort liability if the governmental agency is engaged in the exercise or discharge of a governmental function unless a statutory exception applies. Under the highway exception, MCL 691.1402(1), each governmental agency having jurisdiction over a highway is required to maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. MCL 691.1401(e) defines "highway" as a public highway, road, or street that is open for public travel

and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. Accordingly, defendants only have a duty to maintain the Little Manistee Trail in reasonable repair if it falls within the definition of "highway."

2. The Little Manistee Trail could fall within the definition of "highway" as a "road" or as a "trailway." Because the Legislature used both "road" and "trailway" in the highway exception, each term must be given its proper meaning and the more precisely pertinent term must be applied. The GTLA does not define the term "trailway." When a nontechnical word is not statutorily defined, it is construed and understood according to the common and approved usage of the language. Because "trailway" is not defined in most general dictionaries, it is necessary to look outside the GTLA to discern the meaning of "trailway" that the Legislature likely intended. MCL 324.72101(k), part of the Michigan trailways act, defines "trailway" as "a land corridor that features a broad trail capable of accommodating a variety of public recreation uses." When the Legislature added the word "trailways" to the highway exception in 1999 without defining the word, it likely intended the term to be construed according to the already existing definition in the one statute that is specifically devoted to trailways. The Little Manistee Trail is a broad trail that is primarily used by recreational vehicles, such as off-road vehicles and snowmobiles, and therefore falls squarely within this definition and within the broader ambit of the trailways act. The GTLA does not define "road," but its common meaning is a leveled or paved surface made for traveling by motor vehicle. Although the Little Manistee Trail is a leveled surface, its primary purpose and use is for recreational vehicles, not motor vehicles. Because the Legislature used both "road" and "trailway" in the highway exception, once the trail has been classified as a trailway, which is the more limited term, it cannot be a road.

3. The definition of "highway" includes only those bridges, sidewalks, trailways, crosswalks, and culverts that are "on the highway." Under the last-antecedent rule, the restrictive statutory clause "on the highway" is confined solely to the immediately preceding clause or last antecedent unless something in the statute requires a different interpretation. In this case, the structure and context of MCL 691.1401(e) indicate that a different interpretation is required. The context of the definition makes clear that bridges, sidewalks, trailways, crosswalks, and culverts are considered within the scope of "highways" because they all bear some relationship to the highway, as indicated by the modifying clause "on the highway." Accordingly, this clause must be

applied to all these terms. Thus, in MCL 691.1401(e), the Legislature created two classes of highways: highways per se and things that are included as highways only if they are on the highway. The Little Manistee Trail, which is miles away from any highway, therefore does not fall within the definition of highway.

Affirmed.

Justice MARILYN KELLY, joined by Justices CAVANAGH and HATHAWAY, dissenting, would have reversed the judgment of the Court of Appeals and held that the Little Manistee Trail is a highway for purposes of the highway exception because it is road.

1. The Little Manistee Trail is a leveled surface designed for vehicular travel. It is marked by numerous signs alerting users of two-way traffic, mixed-use traffic, truck weight limits, and curves in the road, among other things. It is also open for use by all vehicles licensed by the Secretary of State. It does not matter whether the Little Manistee Trail is used predominantly for recreational purposes because MCL 691.1401(e) makes no distinction between primary and secondary uses.

2. The Little Manistee Trail is always accessible to the public because it is open year-round. During spring, summer, and fall months, it is used by off-road vehicles, motorcycles, cars, trucks, sport utility vehicles, and semi-trucks. During winter months, it is also used by snowmobiles. Given these characteristics, the Little Manistee Trail is a road that is open for public travel under MCL 691.1401(e). Accordingly, the state is under a duty to maintain it in reasonable repair.

1. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — TRAILWAYS.

Bridges, sidewalks, trailways, crosswalks, and culverts are included within the definition of "highway" for purposes of the highway exception to governmental immunity only if they are "on the highway" (MCL 691.1401[e], 691.1402[1]).

2. GOVERNMENTAL IMMUNITY — HIGHWAY EXCEPTION — WORDS AND PHRASES — TRAILWAYS.

"Trailway," as used in the highway exception to governmental immunity, should be construed according to the definition of "trailway" provided in the trailways act (part of the Natural Resources and Environmental Protection Act), which defines "trailway" as a land corridor that features a broad trail capable of accommodating a variety of public recreation uses (MCL 324.72101[k], 691.1401[e], 691.1402[1]).

Boyer & Dawson, P.C. (by *William G. Boyer and William G. Boyer, Jr.*), for plaintiff.

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, and *Ann Sherman* and *C. Adam Purnell*, Assistant Attorneys General, for defendants.

MARKMAN, J. Plaintiff, Beverly Duffy, was injured while riding an off-road vehicle on what is commonly known as the Little Manistee Trail ("the Trail"). The state of Michigan owns the Trail, and the Department of Natural Resources (DNR) maintains it. Plaintiff sued both entities, and throughout this litigation has set forth various theories to avoid the grant of governmental immunity provided to defendants in the governmental tort liability act (GTLA), MCL 691.1401 *et seq*. In the lower courts, she argued that defendants had a duty to maintain the Trail in reasonable repair pursuant to what is generally referred to as the 'highway exception' to governmental immunity because the Trail is a "trailway" that falls within the statutory definition of "highway." See MCL 691.1401(e); MCL 691.1402(1). In this Court, plaintiff now contends that we should conclude that the Trail is either a "forest road" or a "road" for purposes of the GTLA and that defendants therefore have a duty to maintain this "road" pursuant to the highway exception.

Therefore, this case requires us to determine whether the Little Manistee Trail is a "highway" for the purposes of governmental immunity because the state only has a duty to maintain the Trail in reasonable repair pursuant to the highway exception if it is, in fact, a "highway" under MCL 691.1401(e). We note that this is a question of first impression in the particular context of this case. For although Michigan courts are familiar with the highway exception to governmental

immunity, we are unaware of any case in which a person who has been injured while riding an off-road vehicle on a state trail has claimed that the trail constitutes a "highway" for purposes of the highway exception.

We conclude that the Trail is not a "highway" under MCL 691.1401(e). The Trail is properly classified as a "trailway" within the distinct meaning of that word in Michigan's statutory law, and this "trailway"—which is miles away from any highway—is not within the scope of the highway exception because it is not a "trailway . . . on the highway." *Id.* Furthermore, because the Legislature determined that only trailways on the highway are deemed highways, and because this Trail therefore is clearly not a highway, we refuse plaintiff's invitation to avoid the statute and make the Trail into a highway by calling it a road. In summary, all roads, forest roads, trails, trailways, and highways in this case lead to the conclusion that plaintiff's claim is barred by governmental immunity. Accordingly, we affirm the judgment of the Court of Appeals.

I. FACTS AND HISTORY

Plaintiff, together with her husband and friends, were riding off-road vehicles (ORVs) on the Little Manistee Trail, located in Lake County. Just as plaintiff was about to negotiate a left turn, she ran over some exposed wooden boards that had been partially buried. This caused her ORV to bounce into the air, throwing plaintiff against nearby tree trunks and resulting in serious spinal injuries.

The Trail serves mixed uses, and the DNR has designated it variously as an "ORV route," an "ORV trail," and a "snowmobile trail." Plaintiff was injured on the portion of the Trail designated as an "ORV route," which signifies that any licensed motor vehicle

can operate on that part of the Trail. The Trail is part of a comprehensive system of recreational trailways, which by statute the DNR is obligated to maintain and manage for off-road vehicles. See MCL 324.81123. The state funds the ORV Trail Improvement Fund through the state treasury, and the DNR is authorized to provide grants to local units of government, nonprofit agencies, and individuals to maintain this system of trails, routes, and forest roads. The Little Manistee Trail is maintained by the Irons Area Tourist Association, a nonprofit corporation.

Plaintiff sued defendants on the basis of the highway exception to governmental immunity.[1] Defendants moved for summary disposition, arguing that the Trail is not a "highway" and, as a result, that they had no duty to maintain it in reasonable repair pursuant to the highway exception. The trial court denied this motion, ruling that the Trail fits within the definition of a "highway" in MCL 691.1401(e), which specifically includes "trailways." According to the trial court, "there is no dispute that the Little Manistee is a trailway," and it proceeded to hold that defendants were not exempt from the duty to maintain the Trail. The Court of Appeals reversed. *Duffy v Dep't of Natural Resources*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2010 (Docket No. 289644). The Court of Appeals agreed with the trial court that the Trail is properly classified as a "trailway" and falls within the definition of "highway" in MCL 691.1401(e). According to the Court of Appeals, "[t]here can be no

[1] In a separate action arising out of the same incident, plaintiff sued the carrier of her no-fault automobile policy for no-fault benefits. *Duffy v Grange Ins Co of Mich*, unpublished opinion of the Court of Appeals, issued September 21, 2010 (Docket No. 290198) (reversing the trial court's order granting summary disposition to the defendant-insurance carrier and remanding for further proceedings).

real dispute that this is a trailway . . . ." *Id*. at 3. However, the panel concluded that the limited liability granted to the state in MCL 691.1402(1) applies to *all* trailways. As a result, it ruled that the highway exception did not apply to plaintiff's suit. Plaintiff then filed an application for leave to appeal, which this Court granted. *Duffy v Dep't of Natural Resources*, 488 Mich 861 (2010).

II. STANDARD OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Ostroth v Warren Regency, GP, LLC*, 474 Mich 36, 40; 709 NW2d 589 (2006). Matters of statutory interpretation are also reviewed de novo. *Id*.

III. HIGHWAY EXCEPTION TO GOVERNMENTAL IMMUNITY

The GTLA shields a governmental agency from tort liability "if the governmental agency is engaged in the exercise or discharge of a governmental function."[2] MCL 691.1407(1). The existence and scope of governmental immunity was solely a creation of the courts until the Legislature enacted the GTLA in 1964, which codified several exceptions to governmental immunity that permit a plaintiff to pursue a claim against a governmental agency. This case concerns the highway exception to governmental immunity, MCL 691.1402(1), which provides in relevant part:

> [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair

[2] A governmental agency is "the state or a political subdivision." MCL 691.1401(d). The state, in turn, includes "the state of Michigan and its agencies, departments, [and] commissions . . . ." MCL 691.1401(c). Thus, both defendants—the state and the DNR—are within the provisions of the GTLA.

> so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency. The liability, procedure, and remedy as to county roads under the jurisdiction of a county road commission shall be as provided in [MCL 224.21]. The duty of the state and the county road commissions to repair and maintain highways, and the liability for that duty, extends only to the improved portion of the highway designed for vehicular travel and does not include sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.

The reference to "trailways" in the fourth and final sentence was added by 1999 PA 205. The GTLA further provides in MCL 691.1401(e) its own definition of "highway," which states that

> [as] used in this act:
>
> * * *
>
> (e) "Highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles.

The inclusion of "trailways" in the definition of "highway" was also done in 1999 PA 205. The GTLA does not define other terms in MCL 691.1401(e), including in particular "road" or "trailways."

Although this Court has never before considered the exact issues presented in this case, it has on many occasions interpreted the highway exception. See, e.g., *Robinson v City of Lansing*, 486 Mich 1; 782 NW2d 171 (2010); *Grimes v Dep't of Transp*, 475 Mich 72; 715 NW2d 275 (2006); *Nawrocki v Macomb Co Rd Comm*,

463 Mich 143; 615 NW2d 702 (2000); *Suttles v Dep't of Transp*, 457 Mich 635; 578 NW2d 295 (1998). These decisions are instructive and offer some general principles to guide us.

First, this Court has recognized that the language of the highway exception is not altogether clear. Indeed, we have described the highway exception as "problematic," *Nawrocki*, 463 Mich at 167 n 24, and have noted that its language is "confusing for several reasons," *Suttles*, 457 Mich at 643 n 5 (citation and quotation marks omitted). In *Grimes*, 475 Mich at 78, we identified a particular problem in the act, which we encounter again today—that is, "[b]eyond defining the term 'highway,' the GTLA does not define [the] additional terms [in MCL 691.1401(e)]." The absence of statutory definitions for these terms is particularly troublesome in this case because not only are "road" and "trailway" undefined by the GTLA, but "trailway" is undefined in many general dictionaries as well. In determining whether defendants have a duty to maintain the Trail in reasonable repair because the Trail constitutes a "highway," we remain cognizant of the challenges presented by the drafting of the highway exception and mindful that we are "[c]onstrained to apply the statutory language as best as possible as written . . . ." *Nawrocki*, 463 Mich at 171.

Second, as we recently explained in *Robinson*, 486 Mich at 8 n 4, we know that MCL 691.1402 and MCL 691.1401 must be read together as a single law:

> "It is elementary that statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and that courts will regard all statutes upon the same general subject matter as part of 1 system." *Dearborn Twp Clerk v Jones*, 335 Mich 658, 662; 57 NW2d 40 (1953). In this case, both MCL 691.1401 and MCL 691.1402 are in the GTLA, MCL 691.1401 immediately precedes MCL

> 691.1402, and MCL 691.1401 expressly [defines several terms] "[a]s used in this act . . . ."

See also *Remus v Grand Rapids*, 274 Mich 577, 581; 265 NW 755 (1936) ("In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law.") (citations and quotation marks omitted). But cf. *Grimes*, 475 Mich at 85 (in which we "decline[d] to consult the definitions contained in the [Michigan Vehicle Code] to inform our construction regarding the scope of the highway exception [in the GTLA]," warning that relying on "an unrelated statute to construe another is a perilous endeavor to be avoided by our courts").

When MCL 691.1402(1) and MCL 691.1401(e) are read *in pari materia*, it is clear that all governmental agencies have a duty to maintain highways within their jurisdiction in reasonable repair, but that this duty only extends to "highways" that fall within the definition of "highway" in MCL 691.1401(e). In addition, if the governmental agency is the state or a county road commission, as is the case here, the Legislature has further constricted the scope of the highway exception by limiting the *portion* of the highway covered by the exception. That is, these agencies have no duty under the highway exception to maintain "sidewalks, trailways, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel," MCL 691.1402(1), even though sidewalks, trailways, and crosswalks are included within the definition of "highway." The duty of municipalities and townships is not similarly limited.

Accordingly, determining whether the highway exception to governmental immunity applies to the facts

of this case is a two-pronged inquiry. First, in order for defendants to have a duty to maintain the Little Manistee Trail in reasonable repair, the Trail must fall within the definition of "highway" set forth in MCL 691.1401(e), which again is "a road . . . that is open for public travel" and "includes . . . trailways . . . on the highway." Second, if the Trail is a "highway," defendants only have a duty to maintain it in reasonable repair if the Trail is part of the highway included within the limited duty of the state and county road commission. MCL 691.1402(1). Concerning the first prong, plaintiff argues that the Trail falls within the definition of "highway" in MCL 691.1401(e) because it is a "road"; alternatively, she argues in support of the lower courts' determinations that the Trail is a "trailway." Concerning the second prong, plaintiff argues that, as a "road," the Trail is not excluded from defendants' duty by MCL 691.1402(1) and, alternatively, that the limitation on the state's duty in MCL 691.1402(1) applies only to "trailways . . . outside of the improved portion of the highway designed for vehicular travel," not to *all* trailways, as the Court of Appeals concluded.

IV. TRAIL NOT A "HIGHWAY"

We now address the threshold question whether the Little Manistee Trail is a "highway" under MCL 691.1401(e). Neither party contends that the Trail could fall within the highway exception as anything other than a "road" or a "trailway." Although plaintiff originally argued that the Trail was indisputably a "trailway," and although both lower courts treated this issue as equally undisputed, in her appeal in this Court, she belatedly challenges this classification, arguing instead that the Trail is a "road" for purposes of the

GTLA.[3] We consider and reject both of plaintiff's arguments. First, we conclude that the Trail is a "trailway" within the distinct meaning of that word in Michigan's statutory law. Second, we conclude that the Trail is not a "trailway" covered under MCL 691.1401(e).

The following information about the Trail is relevant in determining its classification under the GTLA. As stated previously, the Trail is on land owned by the state, and it is maintained by and under the jurisdiction of the DNR. The Little Manistee Trail is one of four trail systems within Lake County, which bills itself as "Michigan's Outdoor Recreational Paradise" and actively promotes its more than 300 miles of trailways. A DNR witness, who specialized in the development and maintenance of forest roads and trails, provided an affidavit that stated:

> The Little Manistee Trail & Route (also Snowmobile Trail #344E and #35) are located in part of Newkirk and Cherry Valley Townships in Lake County in the State of Michigan. The Little Manistee Trail and Route is open for ORV and motorcycle use when passable throughout the year. In the winter, from December 1 to March 31, it is also used as designated snowmobile trail, No. 344 and No. 35. The Trail and Route are primarily used year around for recreational vehicle riding purposes. Other wheeled vehicular use of the Route (Forest road) would be an allowed but secondary use.

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[3] Because consideration of plaintiff's new argument is necessary to the proper determination of this case, we will address this issue. *Dation v Ford Motor Co*, 314 Mich 152, 160-161; 22 NW2d 252 (1946) ("When consideration of a claim sought to be raised is necessary to a proper determination of a case, [the] rule [that unpreserved issues are waived] will not be applied."). In reaching this determination, we note that the proper classification of the Trail is an issue that "has been adequately presented and briefed," *Perin v Peuler (On Rehearing)*, 373 Mich 531, 534-535; 130 NW2d 4 (1964), overruled on other grounds by *McDougall v Schanz*, 461 Mich 15 (1999), and that "the question is one of law, and all of the facts necessary for its resolution have been presented," *Kahn-Reiss, Inc v Detroit & Northern S & L Ass'n*, 59 Mich App 1, 12; 228 NW2d 816 (1975).

Thus, according to the DNR, the Trail is both a "trail" and a "route." Plaintiff's accident occurred on the portion of the Trail that is considered a "route." Furthermore, according to the DNR, the Trail permits mixed uses. The Trail is "primarily" used for recreational vehicle riding purposes, and to that end, ORVs are permitted on all portions of the Trail year-round when passable (the Trail is not plowed in the winter), and snowmobiles are permitted in the winter. As a "secondary use," licensed four-wheel conventional vehicles are permitted on the "route" portion. Pictures included in plaintiff's index show signage reflecting these various uses, including a sign for "Mixed Traffic" and a weight-limit sign that permits trucks with more than one axle. These pictures show the Trail as an unpaved dirt path that has no shoulder, directly abuts dense forest, and appears wide enough to allow one lane of conventional traffic.

A. TRAIL AS A "TRAILWAY"

MCL 8.3a instructs that when a nontechnical word is not statutorily defined, it "shall be construed and understood according to the common and approved usage of the language . . . ." However, construing the elusive word "trailway" according to its "common and approved usage of the language" proves to be a difficult, if not impossible, task. As mentioned, not only is "trailway" not defined by the GTLA, but it is not defined in most general dictionaries either.[4] This case, therefore, presents the unusual situation in which there is apparently *no* "commonly approved" meaning of a word that the Legislature chose to employ in a statute, and yet the Legislature did not define the word in that statute.

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[4] The most pertinent definition available is for the word "trail," which is defined as "a path or track made in overgrown or rough terrain by the passage of people or animals." *Random House Webster's College Dictionary* (1997).

It is thus necessary to look outside the GTLA in order to discern the meaning of "trailway" likely intended in MCL 691.1401(e). When we do, we find one statute to be of particular relevance: the Michigan trailways act, MCL 324.72101 *et seq.*, the only Michigan statute that explicitly creates "trailways" and that provides the law governing "trailways." The act was added as part of the Natural Resources and Environmental Protection Act (NREPA) in 1995 to provide for a statewide system of trailways on lands "owned by the state or a governmental agency," MCL 324.72103(1)(a), "for public enjoyment, health, and fitness; [to] encourage constructive leisure-time activities; . . . [and to] enhance the local and state economies," MCL 324.72102. The act defines "trailway" in part as a "land corridor that features a broad trail capable of accommodating a variety of public recreation uses." MCL 324.72101(k).

We are persuaded that when the Legislature added "trailway" to the highway exception in 1999 without defining the word, it likely intended "trailway" to be construed according to the already-existing definition in the statute specifically devoted to trailways. While relying on "an unrelated statute to construe another is a perilous endeavor to be avoided by our courts," *Grimes*, 475 Mich at 85, this case simply does not allow us to avoid the Michigan trailways act. We believe therefore that it is both necessary and proper to look to the act's definition of "trailway" because there is no alternative definition. Furthermore, the chronology of relevant enactments, as well as the trailways act's exclusive focus on *trailways*, leads us to believe that the Legislature must have intended that the definition of "trailways" in MCL 324.72101(k) would apply to other invocations of trailways in Michigan law, and specifically to that term as used in the highway exception. In short, although this Court will not invariably borrow language or meaning from one statute in order to

provide meaning to another when those statutes are not *in pari materia*, this case presents us with such an instance.

Accordingly, we apply the definition of "trailways" provided in the trailways act to MCL 691.1401(e), and conclude that the Little Manistee Trail falls squarely within this definition; it is a "land corridor that features a broad trail capable of accommodating a variety of public recreation uses." MCL 324.72101(k). It is a "broad trail," an unpaved dirt trail that has no shoulder, directly abuts dense forest, and appears wide enough to allow one lane of conventional traffic. And a defining characteristic of the Trail is its capacity to "accommodat[e] a variety of public recreation uses." All types of ORVs are permitted year-round on the Trail, and snowmobiles are permitted in the winter. Moreover, the Little Manistee Trail falls within the broader ambit of the trailways act. It is located on state-owned land and is part of a statewide system of trailways designed "to provide for public enjoyment, health, and fitness; encourage constructive leisure-time activities; . . . [and] enhance the local and state economies," as is evident by the active promotion of the Trail for recreation and tourism. MCL 324.72102.

It is unclear whether plaintiff and the dissent would disagree with the conclusion that the Little Manistee Trail falls within the definition of "trailway" in part 721 of NREPA, for both appear to have overlooked this definition. Indeed, the dissent never even attempts to give meaning to "trailway" as used in the highway exception and, in this way, is entirely unresponsive to this opinion. This lack of response is remarkable for several reasons, not the least of which is that in the lower courts it was *undisputed* that the Trail was a "trailway," and plaintiff herself still maintains that this

is so. This lack of response also highlights the critical flaw in the dissent's approach to the highway exception.

To understand our differing approaches—and why we believe that ours is the better one—we begin with one point of agreement between our opinions. We both agree that "the resolution of this case hinges on the meaning of 'highway' . . . ." *Post* at 232. Recognizing this, both opinions also quote MCL 691.1401(e), which in defining "highway" plainly includes both "roads" and "trailways." We part ways with the dissent, however, with our altogether routine determination that we must give meaning to *all* statutory terms in MCL 691.1401(e)—specifically, to *both* "road" and "trailway."[5]

In accordance with this approach to interpretation, we consider plaintiff's belated challenge to the lower courts' rulings that the Little Manistee Trail was a "trailway." Plaintiff now argues in the alternative that the Trail is a "road." Because "road," like "trailway," is not defined in the GTLA, it "shall be construed and understood according to the common and approved usage of the language . . . ." MCL 8.3a. Unlike "trailway," however, the meaning of "road" is well understood and is found in any dictionary. Its meaning is captured sufficiently, in our judgment, by this definition: a "road" is "a leveled or paved surface, made for traveling by motor vehicle . . . ." *Random House Webster's College Dictionary* (1997).

Although the Little Manistee Trail is "a leveled surface," it does not fall within the common definition

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[5] First principles of interpretation mandate this approach. See *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010) ("When considering the correct interpretation, the statute must be read as a whole."); *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) ("As far as possible, effect should be given to every phrase, clause, and word in the statute."). Thus, contrary to the dissent's assertion, our analysis of "trailway" is hardly an "expedition" that "ignores [our] duty to first analyze the language of the statute that is at issue." *Post* at 233.

of "road" because it is not "made for traveling by motor vehicle." Rather, according to the DNR expert's uncontroverted testimony, its primary purpose and use is for recreational vehicles, and this purpose eclipses the highly limited use of the Trail by motor vehicles.[6] The recreational use of the Trail is so totally defining that we can easily understand why no party in the lower courts even considered that the Trail might be a "road"—i.e., "a leveled or paved surface, made for traveling by motor vehicle." Thus, when comparing the definition of "trailway," which specifically refers to the Trail's defining characteristic—its capacity to "accommodate a variety of public recreation uses"—and the definition of "road," which clearly does not refer in any way to the Trail's defining characteristic as a recreational trail, it is apparent that the Little Manistee Trail is properly characterized as a "trailway," not a "road."

The dissent's conclusion that the Trail is a "road," which it reaches without even considering the meaning of "trailway," violates principles of statutory interpretation, is grounded in faulty logic, and contravenes the Legislature's manifest intent in drafting MCL

[6] Although the dissent challenges the accuracy of this testimony, *post* at 231, plaintiff herself, who, of course, was using the Trail for recreation purposes when she was injured and thus is quite familiar with its use, did not challenge it. The dissent next errs by calling this evidence "immaterial" and claiming that there is "no statutory basis for distinguishing between primary and secondary uses of a road." *Post* at 231. The dissent sees no such statutory basis because it abruptly cuts short its analysis of MCL 691.1401(e) and does not even seek to give meaning to the term "trailway." If the dissent had interpreted the statute in its entirety, and given reasonable meaning to the term "trailway," it would recognize that what distinguishes roads and trailways at their core is that the former are primarily used for motor vehicles and the latter are primarily used for recreation. Thus, in order to properly determine whether the Trail is better, and more precisely, characterized as a road or a trailway, we must consider how it is actually used.

691.1401(e).[7] It is axiomatic that "every word [in the statute] should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011) (citations and quotation marks omitted). It is also axiomatic that "where a statute contains a general provision and a specific provision, the specific provision controls." *Gebhardt v O'Rourke*, 444 Mich 535, 542-543; 510 NW2d 900 (1994). Yet the dissent does not even attempt to give effect to the narrower provision "trailway," even though the Legislature's use of both "road" and "trailway" demands that we accord each term its proper meaning and apply the more precisely pertinent term.[8] Indeed, the dissent's interpretive approach raises the obvious question: Why would this Court, or any court, when offered the choice between applying two statutory terms in resolving a dispute, choose the *less* applicable term?[9]

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[7] The dissent extols its interpretive approach because it is "straightforward," "simple," and leads to an easy resolution. *Post* at 225, 225, 178. We do not doubt that our task would also be made easier if, like the dissent, we did not even attempt to ascertain what the Legislature intended when it added "trailway" to the highway exception. We too might find this to be a "vanilla case of statutory interpretation that is easily resolved," if afforded that luxury. *Post* at 220. However, we are required to interpret statutes in their *entirety* in the most reasonable manner possible.

[8] Further, considering the structure of MCL 691.1401(e), it is evident that "trailway" is a more specific or limited term than "road." First, there are many more transportational ways, or thoroughfares, that fall within "road" than within "trailway"; indeed, virtually every term contained within the highway exception—highway, street, bridge, crosswalk, and culvert—will under many circumstances fall within the definition of "road." Second, under MCL 691.1401(e), every road open for public travel is a "highway," while a "trailway" is only included within "highway" if it is actually "on the highway."

[9] The dissent is correct that "the big question" in this case is whether "the Trail [is] a 'trailway' or a 'road' within the intent of the statute[.]" *Post* at 234. Recognizing this, how can the dissent think that it has properly addressed this question when it nowhere even considers the

The dissent's response is that our interpretation renders "surplusage" the definition of "road." *Post* at 233. This response reveals the illogic of the dissent's approach. As this case illustrates, a "trailway"—i.e., a "land corridor that features a broad trail capable of accommodating a variety of public recreation uses"—will often fall within the broad definition of "road"—i.e., "a leveled or paved surface, made for traveling by motor vehicle." But the converse does not hold true. That is, while a "trailway" will often be a "road," a "road" will only infrequently be a "trailway." Thus, one consequence of the dissent's conclusion that the Trail is a "road" is that "road" would essentially consume "trailway" in MCL 691.1401(e), and genuinely render "trailway" "surplusage." There is no equivalent risk in concluding that the Trail is a "trailway" that "road" could be rendered a nullity. Indeed, our opinion accords full meaning to both "road" and "trailway." It defines both terms, and it ultimately characterizes the Trail as a "trailway" because the latter is the more specific term. To first define the broader term, as the dissent does, in no way dispenses with the need also to define the narrower term; by contrast, defining the narrower term *does* dispense with the need also to define the broader term.[10] In sum, our interpretation does not render any part of MCL 691.1401(e) surplusage.

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meaning of "trailway"? Essentially, this case requires us to determine whether an entity is better characterized as A or B. The dissent avoids any analysis whatsoever of B, and merely asserts peremptorily about the entity, "It is A."

[10] The virtue of this approach is illustrated by the previous discussion, in which we conclude that the term "trailway" constitutes a more precise fit in characterizing the Trail than does the term "road." As a matter of logic, what is true in this case would seem to hold true in almost all cases, to wit, that the narrower and more specific term will constitute a better fit than the broader and more general term.

Finally, the dissent justifies its avoidance of "trailway" by reasoning that "even if the Trail is not a 'covered trailway,' as the majority concludes, it certainly is a road." *Post* at 233. That is, the Trail can still be a "road," and thus a "highway," even if it is a "trailway," but not a "trailway on the highway." However, this directly contradicts what the Legislature stated in MCL 691.1401(e). Under that provision, there are two sets of terms that fall within "highway." First, there are public highways, roads, and streets that are open for public travel. These are always "highways." Second, there are structures that are "included" as highways—"bridges, sidewalks, trailways, crosswalks, and culverts on the highway." In order to be "included" as a highway, a trailway in particular must be *on the highway* and, if it is not, that trailway is *not* a highway. The language and organization of MCL 691.1401(e) make this plain, yet the dissent would contravene the statute and transform a trailway that is not on a highway—and thus is *not* a highway—into a highway by calling it a road, all without first considering whether the Trail at issue is best, and most precisely, characterized as a trailway. In sum, the Legislature determined that roads and trailways are not the same for purposes of the highway exception, in the sense that only *certain* trailways would be deemed highways. Thus, once this Trail has been most precisely and accurately classified as a trailway, it cannot be a road.

Plaintiff posits one more argument to challenge our conclusion that the Trail is a trailway. She urges us to supplement—or perhaps more accurately, to supplant—the common understanding of "road" with a definition of "forest road" in NREPA, arguing that the Trail is a "forest road" or a "road" under this definition. NREPA defines "forest road" as "a hard surfaced road, gravel or dirt road, or other route capable of travel by a 2-wheel

drive, 4-wheel conventional vehicle designed for highway use, except an interstate, state, or county highway." MCL 324.81101(f).[11] Plaintiff's reliance on this definition is unavailing for several reasons. To begin with, it is unnecessary to turn to this definition because "road" is a common and familiar word. It is difficult to think of a word that is more easily "understood according to the common and approved usage of the language . . . ." MCL 8.3a. Plaintiff's invocation of NREPA's definition of "forest road" runs contrary to first principles of interpretation because (1) there is nothing "common" about NREPA's technical and specific definition of "forest road" and (2) relying on this unrelated definition is altogether avoidable in light of more commonplace definitions. *Grimes*, 475 Mich at 85.[12]

Further, even looking past this threshold problem, we are not persuaded that the definition of "forest road" is applicable to the highway exception. MCL 324.81101(f) defines a "*forest* road," while the GTLA defines "highway" to encompass only "roads," and "roads" have been included within the definition of "highway" in MCL 691.1402(1) since the GTLA was first enacted in 1964. Together, these facts suggest that the Legislature that enacted the GTLA and included "road" within the highway exception could not have intended that the definition of "forest road" would be

[11] A "forest road" is distinguished from a "forest trail" by the width of vehicle that can travel on it. See MCL 324.81101(g), which defines a "forest trail" as "a designated path or way capable of travel only by a vehicle less than 50 inches in width."

[12] These factors highlight the differences between relying on NREPA's definitions of "trailway" and "forest road." There is no other alternative available definition of "trailway," yet the definition of "road" is easily ascertained. Further, the definition of "trailway" is general and provides insight into its common meaning, while the definition of "forest road" is technical and specific, and provides little insight into the common meaning of "road."

used to give meaning to "road," because that definition did not even exist when "road" was incorporated into the GTLA. Conversely, it would seem odd that the Legislature that enacted the specific definition of "forest road" would have intended it to apply generally to all "roads" in Michigan, including all "roads" referenced in the highway exception.

However, we need not engage in speculation about this, because the Legislature affirmatively foreclosed the possibility that the definition of "forest road" could be imported into the highway exception by crafting that definition to *distinguish* between "forest roads" and those "highways" that come within the scope of the highway exception. Again, MCL 324.81101(f) defines "forest road" as "a hard surfaced road, gravel or dirt road, or other route capable of travel by a 2-wheel drive, 4-wheel conventional vehicle designed for highway use, *except an interstate, state, or county highway*." (Emphasis added.) State and county highways—those structures of transportation that are most indisputably *within* the highway exception—are expressly excluded from the definition of "forest roads." Thus, the Legislature reasonably and clearly indicated that a "forest road" is not a typical "road," a conclusion that merely underscores the obvious fact that NREPA defines a "*forest* road," while the definition of "highway" in the GTLA speaks only of "roads." In summary, we have little difficulty in concluding that the Little Manistee Trail is properly characterized as a "trailway," not a "road," under the highway exception.[13]

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[13] As further support of our interpretation, we take note of the complete absence of caselaw in support of plaintiff's argument that a recreational trail is a road for purposes of the highway exception. We are unaware of a single case in which a person injured while riding an ORV on a state-owned trail has ever sued the state on the theory that the state had a duty to maintain and repair the trail under the highway exception

B. TRAIL NOT A COVERED "TRAILWAY"

After concluding that the Trail is properly classified as a "trailway," we next address whether this "trailway" falls within the definition of "highway" in MCL 691.1401(e)—that is, whether it is a "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." We conclude that it is not. This definition does not include within its scope *all* trailways, but includes only those "trailways" that are "on the highway." The Little Manistee Trail is not "on" the highway, and it is not "adjacent to" the highway; in fact, it is miles away from any highway. Therefore, it is not a "trailway" covered by MCL 691.1401(e) and thus not a "highway" for purposes of the highway exception to governmental immunity.

This interpretation is compelled by the final clause of MCL 691.1401(e), "on the highway," which, when properly applied, makes clear that the definition of "highway" includes "bridges, sidewalks, trailways, crosswalks, and culverts," but only those "bridges, sidewalks, trailways, crosswalks, and culverts" that are "on the highway." In applying this limiting clause to the entire preceding list of installations within the definition of "highway," we follow the established *exception* to the general rule of statutory construction known as the

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because it was a "road." This, despite the near certainty that others before plaintiff have also been injured while riding an ORV on a state trail, and the fact that there has never been a previous definition of "highway" that would have precluded those persons from offering the same argument that plaintiff does. The absence of caselaw underscores the fact that the state has *never* been held to have a duty under the highway exception to maintain and repair recreational trails that permit ORVs and snowmobiles. It also underscores that the pertinent changes to the highway exception that explain why this case is before us now are the 1999 amendments that added "trailway" to the GTLA.

'last antecedent' rule. This "rule of statutory construction provides that a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, *unless something in the statute requires a different interpretation*." *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002) (emphasis added). In MCL 691.1401(e), there are two indications that a different interpretation is required, and both direct us to follow the exception rather than the general rule and apply the restrictive clause to each of the preceding terms.

First, the structure and context of MCL 691.1401(e) indicate that a different interpretation is required. As previously discussed, there are two sets of terms that fall within its definition of "highway." There are "public highways, roads, or streets that are open for public travel." And there are those terms that are "include[d]" as highways—"bridges, sidewalks, trailways, crosswalks, and culverts on the highway." While there is nothing surprising about including the first class of terms in the definition of "highway," the average reader might well not expect to find the terms listed in the second class. However, the context of the sentence makes clear why these latter terms are considered within the scope of "highways." Namely, all the terms listed in this second class bear some relationship to the highway. The modifying clause, "on the highway," establishes this relationship. Accordingly, to give proper meaning to MCL 691.1401(e) as gleaned from its structure and context, the clause "on the highway" must be applied to *all* the terms that are "include[d]" within the second class of highways—"bridges, sidewalks, trailways, crosswalks, and culverts."

The second reason to follow the exception to the last-antecedent rule in interpreting MCL 691.1401(e) is

that the interpretation reached by applying the general rule would be grammatically incorrect. That is, when the restrictive clause "on the highway" is applied to only its last antecedent, "culvert," an awkward and unreasonable reading results because there are no culverts "on" the highway. "Culvert" is not defined by statute, but its common definition is "a drain or channel crossing *under* a road, sidewalk, etc; sewer, conduit." *Random House Webster's College Dictionary* (1997) (emphasis added). However, while "on" is not the grammatically correct preposition to apply to a "culvert," other terms listed as "included" in the definition of "highway," such as "crosswalks" and "bridges," are normally understood to be "on" the highway.

We are "[c]onstrained to apply the statutory language as best as possible as written . . . ." *Nawrocki*, 463 Mich at 171. In this case, the constraints created by the highly imperfect drafting of MCL 691.1401(e) require us to apply the modifying clause "on the highway" to *all* the terms listed as "included" as "highways," and, in doing so, give these words proper grammatical effect. See *Sun Valley Foods Co v Ward*, 460 Mich 230, 237; 596 NW2d 119 (1999) (stating that "statutory language must be read and understood in its grammatical context"). Accordingly, because it is grammatically anomalous to say that a "culvert," "sidewalk," or "trailway" is "on" the highway,[14] prepositions that more precisely describes these areas' relationship to the highway must be used to give this sentence proper grammatical mean-

[14] While imprecise in a grammatical sense, the Legislature's use of "on" makes some sense in communicating a legislative intention that all the terms listed bear some relationship to the highway. If the Legislature had intended "on the highway" to apply only to "culvert," it would not have chosen "on," given that "under" is the preposition that accurately describes the specific relationship between that type of structure and the highway.

ing. Thus, a "highway," as defined by MCL 691.1401(e), includes a "culvert" "under" the highway; a "sidewalk" "adjacent to" the highway; and importantly, a "trailway" "adjacent to" the highway.

In conclusion, in drafting the statutory definition of "highway" in MCL 691.1401(e), the Legislature created two classes of terms that are considered "highways"—(1) those terms that are "highways" per se, i.e., a "public highway, road, or street that is open for public travel," and (2) those terms "included" as highways, such as "bridges, sidewalks, crosswalks, and culverts," but only if they are "on the highway." Notably, when the Legislature amended the definition of "highway" in 1999 to add "trailways," it added this term to the second category of covered structures, each of which is modified by "on the highway." If the Legislature had intended that *all* trailways—no matter where they are located and irrespective of their relationship to the highway—should be considered highways, it would have added "trailways" to the first category of covered structures. But it did not.

By including "on the highway" in MCL 691.1401(e), the Legislature limited the universe of "bridges, sidewalks, trailways, crosswalks, and culverts" that are considered "highways" for purposes of the highway exception. This limitation is perfectly reasonable because it would be odd if a sidewalk in the middle of a meadow or a *trailway in the middle of a forest*, neither of which is anywhere near a bona fide highway, were considered a "highway" for purposes of governmental immunity. Therefore, it is important to give effect to this essential limiting clause, no matter how inartfully worded.[15]

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[15] The Court of Appeals reached the same result, albeit on different grounds. The Court reasoned that the Trail as a "trailway" *was* a

V. CONCLUSION

The questions of statutory interpretation presented in this case are of first impression and, as with many cases involving the highway exception to governmental immunity, present some challenges due to the drafting of MCL 691.1401(e) and MCL 691.1402(1). However, by using traditional tools of construction and following the guidance of this Court's previous governmental immunity jurisprudence, we interpret the statute as best we can and reach what we believe is the most reasonable interpretation. In doing so, we conclude that the Little Manistee Trail is not a "highway" for purposes of

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"highway" under MCL 691.1401(e) but determined that the state was exempted from liability for *all* trailways by MCL 691.1402(1). Although we rest our decision on the threshold determination that the Trail is not a "highway," we take this opportunity to make clear that the Court of Appeals' interpretation of MCL 691.1402(1) was nonetheless correct.

Our caselaw has consistently treated the exemptions from liability provided to the state and county road commissions in MCL 691.1402(1) as absolute. In *Suttles*, 457 Mich at 644, a case in which this Court construed the pre-1999 version of the statute before the reference to "trailways" was added, we identified three installations that were categorically excluded from the state's and the counties' liability: "(1) sidewalks, (2) crosswalks, or (3) any other installation outside the improved portion of the highway designed for vehicular travel." See also *Nawrocki*, 463 Mich at 161 ("[T]he limited duty does *not* extend to 'sidewalks, crosswalks, or any other installation outside of the improved portion of the highway designed for vehicular travel.' "), and *Robinson*, 486 Mich at 7 (employing the same approach and treating as absolute the exclusion of sidewalks from the state's duty). In accordance with the interpretation of the fourth sentence of MCL 691.1402(1) in *Suttles*, *Nawrocki*, and *Robinson*, the Court of Appeals properly determined that the addition of "trailway" to the statute simply added a fourth specific area that is categorically excluded from the state's and the county road commissions' liability. That is, after the 1999 amendments, in which "trailway" was added between "sidewalk" and "crosswalk," the state's limited duty under the highway exception does not extend to four specific areas: (1) *all* sidewalks, (2) *all* trailways, (3) *all* crosswalks, and (4) any other installation outside the improved portion of the highway designed for vehicular travel.

governmental immunity. The Trail is properly classified as a "trailway" within the distinct meaning of that word in Michigan's statutory law, and, because it is not a "trailway . . . on the highway," it is not a covered "trailway" under MCL 691.1401(e). Accordingly, we affirm the judgment of the Court of Appeals.

YOUNG, C.J., and MARY BETH KELLY and ZAHRA, JJ., concurred with MARKMAN, J.

MARILYN KELLY, J. (*dissenting*). As poet James Whitcomb Riley is said to have remarked, "When I see a bird that walks like a duck and swims like a duck and quacks like a duck, I call that bird a duck." Riley's quip is apropos to this case: when I see a thoroughfare that looks like a road and has signage like a road and is used by the public as a road, I call that thoroughfare a road.

Resolution of this case is straightforward. At issue is whether the Little Manistee Trail (the Trail) is a "highway"—or more pointedly, a road—for purposes of the governmental tort liability act (GTLA).[1] If the Trail is a "highway" as defined by MCL 691.1401(e), then the state is under a duty to maintain it in reasonable repair. If it is not a highway, the state has no such duty.

The majority holds that the Trail is not a highway and that defendants are entitled to summary disposition. It concludes that they have no liability to plaintiff because the highway exception to governmental immunity does not apply. In reaching this conclusion, the majority injects confusion into what should be a simple analysis. I dissent because I believe that all signs, figurative and literal, indicate that the Little Manistee Trail is a "highway" under the GTLA.

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[1] MCL 691.1401 *et seq*.

FACTUAL BACKGROUND

The facts of this case are not in dispute. Plaintiff was riding an off-road vehicle (ORV) on the Little Manistee Trail in Lake County when she ran over some exposed boards partially buried in the traveled portion of the roadway. She was thrown from her ORV against a tree trunk, resulting in spinal injuries and paralysis.

The portion of the Trail on which plaintiff's accident occurred is designated as an "ORV route," meaning that any motor vehicle licensed by the Secretary of State can operate on it. The vehicles permitted there include, but are not limited to, conventional cars, trucks, sport utility vehicles, ORVs, all-terrain vehicles, motorcycles, snowmobiles, semi-trucks, and tractor-trailers. Furthermore, the Trail has myriad signs that guide and direct traffic. Among them are stop signs, two-way-traffic signs, mixed-traffic signs, weight-limit signs, and curve/turn designations.[2]

After plaintiff was injured, she filed suit against the Department of Natural Resources (DNR) and the state of Michigan, alleging that they had failed to adequately maintain the Trail. Plaintiff theorized that, under the highway exception to governmental immunity, defendants had a duty to maintain the Trail in reasonable repair.[3] Defendants moved for summary disposition, arguing that the Trail is not a "highway" and that they have no duty to maintain it. The trial court denied the motion, ruling that the Trail is a "highway" under the GTLA. It reasoned that the act's definition of "highway" specifically includes "trailways." Because it is undisputed that the Little Manistee Trail is a trailway, defendants were under a duty to maintain it in reasonable repair.

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[2] See the Appendix to this opinion; see also plaintiff's appendix filed in this appeal, pp 14-19.

[3] MCL 691.1402(1).

The Court of Appeals reversed the trial court.[4] It concluded that, although the Trail falls within the definition of "highway" in MCL 691.1401(e), the limited liability afforded by the highway exception to governmental immunity applies to all trailways. Thus, it held that the highway exception does not apply to plaintiff's suit.[5]

We granted plaintiff's application for leave to appeal.[6]

STANDARD OF REVIEW AND LEGAL BACKGROUND

We review de novo a trial court's ruling on a motion for summary disposition.[7] This case involves a question of statutory interpretation, which we also review de novo.[8]

The GTLA provides immunity for governmental agencies. Under MCL 691.1407, governmental agencies[9] are generally immune from tort liability while engaged in the exercise or discharge of a governmental function unless an exception to this general rule applies.[10]

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[4] *Duffy v Dep't of Natural Resources*, unpublished opinion per curiam of the Court of Appeals, issued March 9, 2010 (Docket No. 289644).

[5] *Id*. at 3.

[6] *Duffy v Dep't of Natural Resources*, 488 Mich 861 (2010).

[7] *Shay v Aldrich*, 487 Mich 648, 656; 790 NW2d 629 (2010).

[8] *Univ of Mich Regents v Titan Ins Co*, 487 Mich 289, 297; 791 NW2d 897 (2010).

[9] MCL 691.1401(d) defines "governmental agency" as including the "state." MCL 691.1401(c) defines "state" as "the state of Michigan and its agencies, departments, commissions, courts, boards, councils, and statutorily created task forces and includes every public university and college of the state . . . ." Thus, as the majority opinion correctly notes, both defendants are within the scope of the GTLA.

[10] The statutory exceptions to governmental immunity include (1) the "highway" exception, MCL 691.1402, (2) the "motor vehicle" exception, MCL 691.1405, (3) the "public building" exception, MCL 691.1406, (4) the "proprietary function" exception, MCL 691.1413, (5) the "governmental hospital" exception, MCL 691.1407(4), and (6) the sewage-disposal-system-event exception, MCL 691.1417.

The only exception germane to this appeal is the highway exception, MCL 691.1402, which provides in pertinent part:

> (1) . . . [E]ach governmental agency having jurisdiction over a highway shall maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel. A person who sustains bodily injury or damage to his or her property by reason of failure of a governmental agency to keep a highway under its jurisdiction in reasonable repair and in a condition reasonably safe and fit for travel may recover the damages suffered by him or her from the governmental agency.

Thus, it is important to determine if plaintiff was driving her ORV on a "highway" as that term is defined in the GTLA. The act provides at MCL 691.1401(e):

> "Highway" means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles.

However, this provision defines neither "road" nor "open for public travel." We may therefore consult a dictionary for a further understanding of this language.[11]

Random House Webster's College Dictionary defines "road" as "a long, narrow stretch with a leveled or paved surface, made for traveling by motor vehicle, carriage, etc.; street or highway."[12] With respect to the phrase "open for public travel," it defines "open" as, among other things, "without restrictions as to who

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[11] *Klooster v City of Charlevoix*, 488 Mich 289, 304; 795 NW2d 578 (2011). See also MCL 8.3a, which provides that "[a]ll words and phrases shall be construed and understood according to the common and approved usage of the language . . . ."

[12] *Random House Webster's College Dictionary* (2001).

may participate[;] accessible or available[.]"[13] "Public" is defined as "of, pertaining to, or affecting a population or a community as a whole[;] open to all persons[.]"[14] These dictionary definitions comport with the common understanding of a "highway" as used in MCL 691.1401(e), that is, a road, paved or otherwise, that is available for use by everyone.

ANALYSIS

The primary goal of statutory interpretation is to give effect to the Legislature's intent, focusing on the language in the statute.[15] The language provides " 'the most reliable evidence' " of the Legislature's intent,[16] and when construing a statute, a court must read the language in it as a whole.[17]

Considering these rules, as well as our traditional canons of statutory interpretation, I conclude that the Little Manistee Trail is a "highway" within the intent of the GTLA. First, it is a road that is open for public travel. It fits within the common understanding of a "road" because it is a leveled surface designed for travel by motor vehicles and maintained so as to be suitable for vehicular travel.[18] And although the Trail is not paved, a road need not be covered with concrete or asphalt to qualify as a road, given that the definition of

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[13] *Id*.

[14] *Id*.

[15] *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[16] *Id*., quoting *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 246 (1981).

[17] *People v Jackson*, 487 Mich 783, 791; 790 NW2d 340 (2010).

[18] The photographs accompanying this dissent in the Appendix show that the Trail has been built for "mixed traffic," including large trucks with multiple axles weighing up to 15 tons.

"road" includes "a leveled *or* paved surface . . . ."[19] Furthermore, it is undisputed that any motor vehicle properly licensed by the Secretary of State is permitted to travel on the Trail, subject to the applicable weight limitations marked on posted signs. Thus, the Trail satisfies the definition of "road" because it is a thoroughfare "made for traveling by motor vehicle . . . etc.[.]"[20]

I take strong exception to the majority's claim that the Trail is not "made for traveling by motor vehicle[s]."[21] One need only consider the photographs in the Appendix to this opinion to see that the Trail was designed for extensive use by motor vehicles. The signage alerts Trail users to the presence of ORVs, automobiles, and 5-, 9-, and 15-ton trucks.

Second, the Trail is open for public travel. It is beyond question that it is open year-round. During spring, summer, and fall months, it is used by ORVs and motorcycles, as well as by cars, trucks, sport utility vehicles, and large semi-trucks. During winter months, it is also used by snowmobiles and motor vehicles to the extent weather conditions permit. No statutory prohibition limits its use to certain seasons or to a particular type of use. Consequently, the Little Manistee Trail is accessible to the general public and is open for public travel.

The majority asserts that the Trail's "primary purpose and use is for recreational vehicles, and this purpose eclipses the highly limited use of the Trail by motor vehicles."[22] It also claims that "[t]he recreational use of the Trail is so totally defining that we can easily

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[19] *Random House Webster's College Dictionary* (2001) (emphasis added).

[20] *Id.*

[21] *Ante* at 213-214.

[22] *Ante* at 214.

understand why no party . . . considered that the Trail might be a 'road' . . . ."[23] But defendant's expert, on whose testimony the majority relies, stated that the Trail "is open to properly registered ORVs and street licensed vehicles." This testimony answers the question of whether the Trail qualifies as a "road." More importantly, it is immaterial to determining whether the Trail is a road if it is used more frequently by semi-trucks, ORVs, or pedestrians. Indeed, there is no statutory basis for distinguishing between primary and secondary uses of a road.[24] Accordingly, the majority has impermissibly overrun the Legislature's definition of "highway" in MCL 691.1401(e) and replaced it with a judicially created "purpose of use" test.

Because the Trail is a "road" that is "open for public travel," it is necessarily a "highway" as that term is defined in MCL 691.1401(e). The ramifications of this conclusion are clear: governmental agencies, in this case the DNR and the state of Michigan, have an affirmative duty to maintain it in such reasonable repair as to make it safe and convenient for public travel. To the extent the Court of Appeals held otherwise, it erred.[25]

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[23] *Ante* at 214.

[24] The majority indicates that a statutory basis exists for distinguishing between the Trail's primary and secondary uses when determining whether it is a "road." *Ante* at 214 n 6. But it fails to cite the language on which it relies. In fact, there is no statutory language in MCL 691.1401(e); the rest of the GTLA; the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*.; or any other act that allows the majority to draw this distinction.

[25] Contrary to the majority's suggestion, I need not reach the issue of whether the Little Manistee Trail is a "trailway" within the definition of "highway" in MCL 691.1401(e). This is because the Trail is so clearly a "road" that is "open for public travel" and, thus, a highway. I do not consider the application of NREPA's definition of "forest road," see MCL 324.81101(f), for the same reason.

THE MAJORITY'S FLAWED ANALYSIS

The majority's statutory interpretation is flawed. The first step in interpreting a statute is analyzing its language, a maxim that appears in virtually every statutory-interpretation-centric dispute before the Court.[26] Yet the majority's attention to defining "highway" as used in the GTLA strays from the GTLA and travels to the Natural Resources and Environmental Protection Act (NREPA), MCL 324.101 *et seq*. And it engages in this expedition not to properly define or apply the term "highway," but to define and apply the term "trailway."[27] It does this notwithstanding the fact that the resolution of this case hinges on the meaning of "highway," not the meaning of "trailway."

The majority suggests that, by not defining "trailway," I ignore the central issue in this case. Its position in this regard is remarkable, given that I have addressed an argument raised by the parties—one that the majority entirely ignores. The issue before us is not the definition of "trailway" in NREPA, but whether the Little Manistee Trail is a "highway" under the GTLA. Even assuming arguendo that the Trail is not a "covered trailway" as the majority concludes, it is a *road* and, thus, a "highway" under MCL 691.1401(e).

Furthermore, the majority's preoccupation with the fact that the parties argued that the Trail is a "trailway" in the lower courts is also misplaced. This Court's order granting leave to appeal requested that the parties address "whether the Little Manistee Trail is a 'highway' within the meaning of MCL 691.1401(e)." *Duffy*, 488 Mich at 861. Thus, because the definition of "highway" includes "road," and plaintiff argued in this Court that the Trail is a "road," the fact that the parties previously argued that it is a "trailway" is inconsequential.

[26] See, e.g., *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76; 780 NW2d 753 (2010).

[27] See part IV of the majority opinion. The majority relies on the language of NREPA even while it acknowledges that "this Court will not invariably borrow language or meaning from one statute in order to provide meaning to another when those statutes are not *in pari materia* . . . ." *Ante* at 211-212.

Under the GTLA, a "highway" is a "road . . . that is open for public travel." As I have explained in detail earlier, that definition applies to the Little Manistee Trail, regardless of whether the Trail qualifies as a "trailway" in an unrelated act. The majority's departure from the GTLA and foray into NREPA ignores its duty to first analyze the language of the statute that is at issue. And it is superfluous when the language of the GTLA can be straightforwardly applied, as in this case.

A second analytical maxim that guides us is that the Court must avoid a statutory interpretation that would render any part of a statute surplusage or nugatory.[28] In this regard, the first clause of MCL 691.1401(e) provides that a "highway" is "a public highway, road, or street that is open for public travel . . . ." The next clause indicates that "highways" include "bridges, sidewalks, trailways, crosswalks, and culverts on the highway." Hence, a "road . . . that is open for public travel" is a "highway," and so too are "bridges, sidewalks, [and] trailways . . . on the highway." Therefore, even if the Trail is not a "covered trailway," as the majority concludes, it certainly is a road. The majority's statutory interpretation glosses over the first clause of the statute and, in fact, renders it surplusage.

The majority counters this point with the assertion that my analysis renders the term "trailway" surplusage. But the flaw in its argument is apparent from the outset when it concedes that a trailway only sometimes

[28] See, e.g., *AFSCME v Detroit*, 468 Mich 388, 399; 662 NW2d 695 (2003) ("[E]very word should be given meaning, and we should avoid a construction that would render any part of the statute surplusage or nugatory.") (citations and quotation marks omitted).

falls within the definition of a "road."[29] The Trail precisely fits within the majority's definition of a "road." It is a "trailway," within the majority's definition, that is open for public travel by motor vehicles. Thus, it at once satisfies the majority's imported meaning of "trailway" and the definition we both agree upon of "road." But because the Trail satisfies the majority's definition of "trailway," the majority renders "road" mere surplusage.

I agree with the majority that trailways that are not open for public travel by motor vehicles are not roads. Hence, my conclusion that the Trail is a "road" does not consume "trailways" in MCL 691.1401(e). Nor does it render the inclusion of "trailways" in that statute surplusage.

Similarly, the majority asserts that the GTLA makes clear that only certain trailways will be considered highways,[30] presumably those that run alongside a highway. But this reasoning begs the big question: Is the Trail a "trailway" or a "road" within the intent of the statute? If it qualifies as a "road," as I have concluded, it is irrelevant that it does not run alongside a highway.

Finally, the majority claims that I "never even attempt[] to give meaning to 'trailway' " and that my dissent is "entirely unresponsive to [its] opinion."[31] I have noted that it serves no useful purpose to consider whether the Trail is a "trailway" as defined by an

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[29] *Ante* at 216 (stating that trailways "will often fall within the broad definition of road"). This concession is hardly surprising. Most people would consider walking, hiking, or biking trails to be "trailways," yet they would not be "roads" under the GTLA because they are not open for travel by motor vehicles.

[30] *Ante* at 217.

[31] *Ante* at 212.

DRIVER v NAINI

Docket No. 140922. Decided August 1, 2011.

Willie and Beverly Driver brought a medical malpractice action in the Wayne Circuit Court against Mansoor G. Naini, M.D., and Michigan Cardiology Associates, P.C. (MCA), after Willie was diagnosed with colon cancer in November 2005. Plaintiffs sent Naini and MCA a notice of intent to bring the action (NOI) on April 25, 2006, and on October 23, 2006, filed a complaint against Naini and MCA. On January 19, 2007, Naini and MCA filed a notice of nonparty at fault, naming Cardiovascular Clinical Associates, P.C. (CCA), as a potential defendant because Naini had worked for CCA at some point during his treatment of Willie. On February 1, 2007, plaintiffs sent an NOI to CCA and moved to file a first amended complaint that included CCA as a defendant. The court, Kathleen Macdonald, J., granted the motion, and on March 22, 2007, plaintiffs filed an amended complaint adding CCA as a defendant. CCA moved for summary disposition, alleging that plaintiffs had failed to comply with the statutes concerning procedure in medical malpractice actions and that their claim against CCA was time-barred. The court denied the motion. Following a grant of leave to appeal, the Court of Appeals, WILDER, P.J., and METER and FORT HOOD, JJ., reversed the decision of the trial court and remanded the case for entry of summary disposition in CCA's favor. 287 Mich App 339 (2010). The Supreme Court ordered and heard oral argument on whether to grant plaintiffs' application for leave to appeal or take other peremptory action. 488 Mich 957 (2010).

In an opinion by Justice MARY BETH KELLY, joined by Chief Justice YOUNG and Justices MARKMAN and ZAHRA, the Supreme Court *held*:

A plaintiff is not entitled to amend an original notice of intent to add nonparty defendants so that the amended notice relates back to the original filing for purposes of tolling the statutory period of limitations.

1. MCL 600.2912b(3) provides for service of additional NOIs on parties that will be added to an existing medical malpractice action. When a medical malpractice claimant files an NOI with

time remaining on the applicable period of limitations, under MCL 600.5856(c) that NOI tolls the statutory period of limitations for up to 182 days with regard to the recipients of the NOI. When a plaintiff discovers a claim two or more years after the negligent act occurred, the plaintiff must commence the action within six months after he or she discovered or should have discovered the existence of the claim, whichever is later. In this case, the six-month discovery rule provided the applicable period of limitations, but plaintiffs failed to provide an NOI to CCA within that six-month period. Thus, the statutory period of limitations was not tolled with regard to CCA, and plaintiffs' complaint with regard to CCA was time-barred.

2. Plaintiffs could not amend their original NOI pursuant to the Supreme Court's holding in *Bush v Shabahang*, 484 Mich 156 (2009), which did not apply to the facts of this case. Under *Bush* and MCL 600.2301 a plaintiff whose timely NOI failed to meet all the content requirements of MCL 600.2912b(4) may amend the NOI and preserve the tolling an NOI provides if the plaintiff had made a good-faith effort to comply with MCL 600.2912b(4). By its plain language, however, MCL 600.2301 only applies to actions or proceedings that are pending. Because plaintiffs' claim against CCA was barred by the statute of limitations, it could not be commenced and, thus, was never pending. Further, allowing amendment under MCL 600.2301 would not be in the furtherance of justice and would affect CCA's substantial rights because allowing amendment would conflict with the statutory requirements that govern the commencement of medical malpractice actions and the tolling of limitations periods. Permitting amendment of an original NOI to add a nonparty defendant would allow a plaintiff to add nonparty defendants to an existing action for an undefined amount of time and would subvert the principles underlying limitations periods.

3. MCL 600.2957(2) did not save plaintiffs' claim against CCA. The statute permits a party to add a defendant to an action if the claim against the new defendant would not have been time-barred at the time of the filing of the original action. When plaintiffs commenced their action against Naini and MCA, the period of limitations had already expired with respect to CCA because the NOI sent to Naini and MCA did not toll the period of limitations with respect to CCA.

Court of Appeals' result only affirmed; reversed in all other respects.

Chief Justice YOUNG, concurring, continued to adhere to his partial dissent in *Potter v McLeary*, 484 Mich 397 (2009), but joined

the majority opinion because it faithfully applied the rule established in *Potter* and the jurisprudence of the state benefits from having a clear majority rule of law in this case.

Justice HATHAWAY, joined by Justice MARILYN KELLY, dissenting, stated that the majority had incorrectly interpreted the relevant statutes, including the applicable statutes of limitations. MCL 600.2957(2) sets forth the procedural requirements imposed on a plaintiff who chooses to add an identified nonparty to a suit. For purposes of calculating the limitations period, a plaintiff who adds a nonparty as a named defendant stands in the same position as he or she would have on the date of the original filing. Justice HATHAWAY observed that correctly calculating the applicable limitations periods in this case required three separate analyses. The first involved the two-year medical malpractice period of limitations, which is tolled when the NOI is mailed. Since plaintiffs provided CCA an NOI on February 1, 2007, they could have proceeded with a claim of malpractice against CCA for any acts of negligence occurring after February 1, 2005. The second involved calculating the period of limitations pursuant to the discovery rule. Assuming that plaintiffs met their burden of proving that they could not have discovered the existence of their claim against CCA before they received the notice of nonparty at fault, their claim was governed by the six-month discovery rule of MCL 600.5838a(2). Additionally, MCL 600.2957(2) has its own 91-day window in which a plaintiff can bring a claim against the identified nonparty at fault, as long as the claim would have been timely on the date that the original action was filed. When the proper calculations were performed, at least portions of plaintiffs' claim against CCA would have been timely on the date that the original action was filed. If the majority's reasoning were correct and a plaintiff were not afforded the opportunity to start his or her claim by providing an NOI to the nonparty at fault during the 91-day window afforded by MCL 600.2957(2), that statute and the NOI statutes would irreconcilably conflict. Instead, the statutes should have been read harmoniously in concert with MCL 600.2301, which requires that the court disregard any error or defect in the proceedings that does not affect the substantial rights of the parties. MCL 600.2301 should have been applied in this case, and plaintiffs' claim should not have been dismissed with prejudice.

Justice CAVANAGH concurred in the result proposed by Justice HATHAWAY's dissent.

LIMITATION OF ACTIONS — MEDICAL MALPRACTICE — NOTICE OF INTENT TO FILE A SUIT — AMENDMENT — NONPARTY DEFENDANTS.

A plaintiff in a medical malpractice action is not allowed to amend his or her original notice of intent to bring the action to add a nonparty defendant so that the amended notice relates back to the original filing for purposes of tolling the statutory period of limitations; the period of limitations will not be tolled if the plaintiff fails to provide a notice of intent to a potential defendant within the applicable period of limitations.

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Erlich, Rosen, & Bartnick, P.C.* (by *Sheldon D. Erlich*), for Willie and Beverly Driver.

Tanoury, Nauts, McKinney & Garbarino, P.L.L.C. (by *Linda M. Garbarino* and *David R. Nauts*), for Cardiovascular Clinical Associates, P.C.

Amici Curiae:

Miller, Canfield, Paddock & Stone, P.L.C. (by *Jaclyn Shoshana Levine* and *Kelly M. Drake*), for the Michigan Optometric Association.

Kerr Russell & Weber PLC (by *Daniel J. Schulte* and *Joanne Geha Swanson*) for the Michigan State Medical Society.

Collins, Einhorn, Farrell & Ulanoff, P.C. (by *Noreen L. Slank* and *Geoffrey M. Brown*), for ProAssurance Corporation.

MARY BETH KELLY, J. In this medical malpractice action, we must decide whether a plaintiff is entitled to amend an original notice of intent (NOI) when adding a nonparty defendant to a pending action pursuant to this Court's holding in *Bush v Shabahang*[1] and MCL 600.2301 so that the amended NOI relates back to the original filing

[1] *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009).

for purposes of tolling the statute of limitations. We hold that a plaintiff is not entitled to amend an original NOI to add nonparty defendants so that the amended NOI relates back to the original filing for purposes of tolling the statute of limitations, and we affirm the result reached by the Court of Appeals only and reverse the Court of Appeals' judgment in all other respects.

I. FACTS AND PROCEDURAL HISTORY

In 2003, plaintiff Willie Driver[2] visited defendant Mansoor Naini, M.D., who administered a carcinoembryonic antigen (CEA)[3] test to plaintiff. The results indicated that plaintiff had a slightly elevated CEA level. Dr. Naini did not order a colonoscopy or take any further action even though plaintiff was over the age of 50 and had a family history of colon cancer. Shortly thereafter, plaintiff began experiencing unexplained weight loss, and in 2005 a gastroenterologist diagnosed him with stage IV colon cancer with metastasis to the liver.

On April 25, 2006, plaintiff's counsel sent a notice of intent (NOI) to file a medical malpractice action to Dr. Naini and Michigan Cardiology Associates, P.C., (MCA) as required by MCL 600.2912b(1).[4] Plaintiff complied with timely filed a complaint against Dr. Naini and MCA on

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[2] There are two plaintiffs in this case, but because plaintiff Beverly Driver's claims are derivative of Willie Driver's claims, we use the singular term "plaintiff" to refer to the latter throughout the opinion.

[3] "Carcinoembryonic antigen" is defined as

> [a] glycoprotein (carbohydrate plus protein) occurring in the feces (stool), secretions of the liver and pancreas, and the blood plasma of patients with neoplastic (tumors, cancers) diseases and non-neoplastic conditions, as cancers of the colon, pancreas, breast, and lung, alcoholic cirrhosis of the liver, inflammatory bowel disease, rectal polyps, etc. [1 Schmidt, *Attorneys' Dictionary of Medicine* (Matthew Bender & Co, Inc 2000), p C-66.]

[4] MCL 600.2912b(1) provides:

October 23, 2006.[5] Plaintiff alleged that Dr. Naini had failed to properly screen for colon cancer and alleged that MCA was vicariously liable for the malpractice.

In January 2007, Dr. Naini and MCA sent a notice of nonparty at fault to plaintiff's counsel pursuant to MCR 2.112(K). Defendants named Cardiovascular Clinical Associates, P.C. (CCA) as a potential defendant. Defendants indicated that CCA might be vicariously liable because Dr. Naini worked for CCA at some point during his treatment of plaintiff.

On February 1, 2007, plaintiff sent an NOI to CCA and moved to file an amended complaint to add CCA as a defendant pursuant to MCL 600.2957(2), the nonparty fault statute.[6] The circuit court granted the motion, and, 49 days later, on March 22, 2007, plaintiff filed an amended complaint and added CCA as a defendant to the action. In doing so, plaintiff failed to comply with the 91-day notice waiting period for adding a defendant to an existing medical malpractice action under MCL 600.2912b(3).[7]

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

[5] There is no dispute that the complaint was timely and valid as to these defendants.

[6] MCL 600.2957(2) provides:

> Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.

[7] For purposes of this opinion, we assume, without deciding, that the 91-day notice period under MCL 600.2912b(3) applies.

Subsequently, CCA moved for summary disposition, arguing that plaintiff's claim against it was time-barred because the statute of limitations had expired. According to CCA, plaintiff failed to toll the statute of limitations when he did not comply with the notice waiting period. Plaintiff responded that he had timely filed the amended complaint in accord with the nonparty fault statute, MCL 600.2957(2). The circuit court agreed and denied CCA's motion.

The Court of Appeals granted CCA leave to appeal and reversed the circuit court and remanded for entry of summary disposition in CCA's favor.[8] The Court of Appeals held that plaintiff's claim accrued "at the latest" when he was diagnosed with colon cancer in November 2005 and that plaintiff had two years from that point forward to commence an action against CCA.[9] The Court of Appeals reasoned that because plaintiff filed the amended complaint without first complying with the notice waiting period, the complaint failed to commence an action that tolled the statute of limitations.[10] The Court of Appeals cited *Burton v Reed City Hosp Corp*,[11] in which this Court held that a premature complaint does not commence an action that tolls the statute of limitations in a malpractice suit.[12] Here, plaintiff filed his amended complaint 49 days[13] after he sent CCA an NOI; therefore, the Court of Appeals concluded, the premature complaint did not toll the statute of limitations and plaintiff's claim had become time-barred.[14]

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[8] *Driver v Naini*, 287 Mich App 339; 788 NW2d 848 (2010).

[9] *Id*. at 345.

[10] *Id*. at 348.

[11] *Burton v Reed City Hosp Corp*, 471 Mich 745; 691 NW2d 424 (2005).

[12] *Driver*, 287 Mich App at 347-348, citing *Burton*, 471 Mich at 753-754.

[13] The Court of Appeals erroneously stated that plaintiff filed his amended complaint 39 days after he sent CCA the NOI. *Id*. at 348.

[14] *Id*. at 348-349.

However, the Court of Appeals concluded that plaintiff's claim was saved in part by MCL 600.2957(2).[15] The Court of Appeals reasoned that because plaintiff's claim was partially valid under MCL 600.2957(2), yet totally barred by MCL 600.2912b, the statutes irreconcilably conflicted.[16] The Court of Appeals concluded that MCL 600.2912b was more specific and governed because it applies only in medical malpractice actions, whereas MCL 600.2957(2) applies to actions in general.[17] Accordingly, the Court of Appeals reversed the circuit court's order denying CCA's motion for summary disposition and remanded for entry of summary disposition in CCA's favor.[18] Plaintiff applied for leave to appeal in this Court, and we ordered and heard oral argument on whether to grant the application.[19]

II. STANDARD OF REVIEW

We review de novo a circuit court's decision on a motion for summary disposition.[20] This case requires interpretation of the several statutory provisions involved. We also review de novo issues of statutory interpretation.[21] When interpreting the meaning of a statute, our primary goal is to discern the intent of the

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[15] *Id*. at 350-351.

[16] *Id*.

[17] *Id*. at 352.

[18] *Id*. at 353-355.

[19] *Driver v Cardiovascular Clinical Assoc*, 488 Mich 957 (2010). In our order, we directed the parties to address "whether this Court's decision in [*Bush*, 484 Mich 156], allows for the application of MCL 600.2301 in cases involving prematurely filed complaints under MCL 600.2912b(1), and whether [*Burton*, 471 Mich 745], retains any viability in light of *Bush*."

[20] *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 424; 751 NW2d 8 (2008).

[21] *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

Legislature by first examining the plain language of the statute.[22] Statutory provisions must be read in the context of the entire act, giving every word its plain and ordinary meaning.[23] When the language is clear and unambiguous, we will apply the statute as written and judicial construction is not permitted.[24]

III. APPLICABLE LAW

MCL 600.2912b(1) requires a claimant to submit an NOI to a potential defendant before commencing a medical malpractice suit. This requirement is mandatory[25] and applies equally to individuals and professional entities, including professional corporations.[26] Ordinarily, the claimant must then wait 182 days before filing a complaint.[27]

The Legislature set forth a different set of requirements in MCL 600.2912b(3) for adding a defendant to an existing medical malpractice action. MCL 600.2912b(3) provides for service of additional NOIs on health professionals and health facilities that will be added to an existing medical malpractice action as follows:

> The 182-day notice period required in subsection (1) *is shortened to 91 days* if all of the following conditions exist:

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[22] *In re MCI Telecom Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999); *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999).

[23] *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008); *Macomb Co Prosecutor v Murphy*, 464 Mich 149, 158; 627 NW2d 247 (2001).

[24] *Danse Corp v Madison Hts*, 466 Mich 175, 182; 644 NW2d 721 (2002).

[25] *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002); *Burton*, 471 Mich at 752-753, citing *Omelenchuk v City of Warren*, 461 Mich 567, 572; 609 NW2d 177 (2000).

[26] *Potter v McLeary*, 484 Mich 397, 402-403; 774 NW2d 1 (2009).

[27] MCL 600.2912b(1). A claimant need only wait 154 days if the potential defendant fails to submit a timely response. MCL 600.2912b(8).

(a) The claimant has previously filed the 182-day notice required in subsection (1) against other health professionals or health facilities involved in the claim.

(b) The 182-day notice period has expired as to the health professionals or health facilities described in subdivision (a).

(c) The claimant has filed a complaint and commenced an action alleging medical malpractice against 1 or more of the health professionals or health facilities described in subdivision (a).

(d) The claimant did not identify, and could not reasonably have identified a health professional or health facility to which notice must be sent under subsection (1) as a potential party to the action before filing the complaint. [Emphasis added.]

The 91-day waiting period required by MCL 600.2912b(3) is consistent with MCL 600.2957(2), which applies to lawsuits generally.[28] MCL 600.2957(2) provides:

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[28] The Court of Appeals clearly erred by holding that MCL 600.2912b irreconcilably conflicts with MCL 600.2957(2). The conflict analysis was unnecessary because the Court incorrectly determined that plaintiff's claim was partially saved by MCL 600.2957(2), but completely barred by MCL 600.2912b. As explained later in this opinion, plaintiff's entire claim was time-barred, and neither statute saved the claim. Moreover, the Court of Appeals failed to consider how the 91-day period in MCL 600.2957(2) is consistent with the 91-day notice waiting period in MCL 600.2912b(3). Specifically, nothing in MCL 600.2957(2) excuses a plaintiff from having to wait until the notice period expires before commencing an action against a defendant as is required by MCL 600.2912b(3). MCL 600.2957(2) only requires a plaintiff to file a motion to add a defendant within 91 days of receiving notice of the nonparty at fault; it does not require the plaintiff to file the amended complaint within 91 days. Therefore, a plaintiff can file a motion to add a defendant within 91 days after receiving notice of the nonparty, file an amended NOI, and wait until the notice period expires before filing an amended complaint. And while MCR 2.112(K)(4) (the court rule governing the addition of nonparties to a pending action) does seem to require that a plaintiff file an amended complaint within 91 days, it also states that "[t]he court may permit later amendment as provided in MCR 2.118," and under MCR

> Upon motion of a party *within 91 days* after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action. [Emphasis added.]

When a claimant files an NOI with time remaining on the applicable statute of limitations, that NOI tolls the statute of limitations for up to 182 days *with regard to the recipients of the NOI*.[29] In a medical malpractice action, a claimant normally has two years from the time his claim accrues to commence a suit.[30] A medical malpractice claim accrues "at the time of the act or omission that is the basis for the claim . . . , regardless of the time the plaintiff discovers or otherwise has knowledge of the claim."[31]

2.118(A)(2) "[l]eave shall be freely given when justice so requires." Given the foregoing, the dissent's assertion that MCL 600.2912b and MCL 600.2957(2) are only reconcilable if read in concert with MCL 600.2301 is plainly wrong. To summarize, in order to add a nonparty at fault to a medical malpractice case, a plaintiff should move to add the nonparty within 91 days of receiving notice of that nonparty. Then, in a motion to amend a claim, the plaintiff should indicate that he or she intends to file the amended claim at the conclusion of the NOI waiting period.

[29] MCL 600.5856(c) provides:

> The statutes of limitations or repose are tolled in any of the following circumstances:
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> * * *
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> (c) At the time notice is given in compliance with the applicable notice period under section [MCL 600.2912b], if during that period a claim would be barred by the statute of limitations or repose; but in this case, the statute is tolled not longer than the number of days equal to the number of days remaining in the applicable notice period after the date notice is given.

See, also, *Waltz v Wyse*, 469 Mich 642, 646 n 6; 677 NW2d 813 (2004).

[30] MCL 600.5838a(2); MCL 600.5805(1) and (6).

[31] MCL 600.5838a(1).

However, when a plaintiff discovers a claim two or more years after the alleged negligent act occurred, then the plaintiff must commence an action "*within 6 months after the plaintiff discovers* or should have discovered *the existence of the claim*, whichever is later."[32]

IV. ANALYSIS

A. PLAINTIFF DID NOT TOLL THE STATUTE OF LIMITATIONS APPLICABLE TO CCA AND HIS SUIT IS TIME-BARRED

In this case, the six–month discovery rule provides the applicable limitations period.[33] Plaintiff alleged in his complaint that Dr. Naini failed to screen for cancer in 2003 after a test showed that he had an elevated CEA level. This was the negligent act that formed the basis for his claim. Because the claim accrued in 2003 and plaintiff discovered the claim more than two years later, the six-month discovery rule applied. Contrary to the Court of Appeals' erroneous conclusion, the November 2005 diagnosis of cancer was not the negligent act that gave rise to plaintiff's claim.[34] Accordingly, plaintiff had

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[32] MCL 600.5838a(2) (emphasis added). This provision is generally referred to as the discovery rule.

[33] The dissent makes inconsistent statements regarding application of the discovery rule in this case, and states that "at least portions" of plaintiff's claims against CCA are governed by the standard two-year statute of limitations because plaintiff alleged that Dr. Naini negligently treated him until November 2005. *Post* at 271. However, the dissent overlooks the fact that plaintiff conceded in his brief on appeal and during oral argument that the six-month discovery rule governs his negligence claim with regard to CCA. Nevertheless, as discussed later in this opinion, even if a portion of plaintiff's claims were governed by the two-year statute of limitations, plaintiff failed to commence an action against CCA that tolled the statute of limitations because his complaint against CCA was premature. See *Burton*, 471 Mich at 753-754. Thus, plaintiff's claims would be time-barred even if the two-year limitations period were applicable. See *id*.

[34] See MCL 600.5838a(1) (stating that a medical malpractice claim "*accrues at the time of the act or omission that is the basis for the claim . . . regardless of the time the plaintiff discovers or otherwise has knowledge of the claim*") (emphasis added).

six months from November 2005 (i.e., until May 2006) to commence a medical malpractice action against *all* defendants.[35]

There is no dispute that plaintiff timely filed suit within this six-month period with respect to Dr. Naini and MCA. Plaintiff provided those defendants an NOI in April 2006 and then waited 182 days before filing his complaint in October 2006. Plaintiff, however, first provided CCA an NOI in February 2007 and filed a complaint against CCA in March 2007, long after the six-month discovery period expired in May 2006. Because a medical malpractice plaintiff must provide *every* defendant a timely NOI in order to toll the limitations period applicable to the recipient of the NOI, plaintiff failed to toll the limitations period applicable to CCA.[36] Hence, plaintiff's complaint was time-barred with regard to CCA, and the Court of Appeals properly remanded the case for entry of summary disposition in CCA's favor.[37]

B. *BUSH v SHABAHANG* IS INAPPLICABLE

Plaintiff, however, argues that he should be permitted to amend his original NOI pursuant to this Court's holding in *Bush*[38] and MCL 600.2301[39] so that the NOI

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[35] MCL 600.5838(2).

[36] MCL 600.5856(c); MCL 600.2912b(1); *Potter*, 484 Mich at 402-403.

[37] MCL 600.5838a(2) ("A medical malpractice action that is not commenced within the time prescribed by this subsection is barred.").

[38] *Bush v Shabahang*, 484 Mich 156.

[39] MCL 600.2301 provides:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

he sent to CCA relates back in time to his original NOI. According to plaintiff, allowing amendment and relation back would preserve tolling with respect to all three defendants.

In *Bush*, the plaintiff sent an NOI to multiple defendants two days before the statute of limitations was set to expire.[40] The defendants moved for summary disposition and argued in part that the plaintiff's NOI was defective because it failed to state a particularized standard of care.[41] The circuit court granted summary disposition with regard to three of the defendants, but denied summary disposition with respect to certain claims against defendants Spectrum Health and West Michigan Cardiovascular Surgeons (WMCS).[42] On appeal, the Court of Appeals held that the plaintiff's NOI did not comply with the requirements of MCL 600.2912b(4) with respect to certain claims of liability against WMCS and Spectrum Health.[43] The Court affirmed in part, reversed in part, and remanded to the circuit court for entry of partial summary disposition without prejudice of these claims, but held that the statute of limitations remained tolled until entry of the judgment of summary disposition.[44] This Court granted leave to appeal and addressed whether a defective NOI tolls the statute of limitations under MCL 600.5856(c).[45] The *Bush* majority held that when an NOI fails to meet all of the *content* requirements under MCL 600.2912b(4),[46] MCL 600.2301 allows a plaintiff to

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[40] *Bush v Shabahang*, 278 Mich App 703, 707; 753 NW2d 271 (2008).

[41] *Id*.

[42] *Id*. at 706-708, 716-719.

[43] *Id*. at 718-719, 726-727.

[44] *Id*. at 727.

[45] *Bush*, 484 Mich at 164.

[46] MCL 600.2912b(4) provides:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:

amend the NOI and preserve tolling unless the plaintiff failed to make a good-faith effort to comply with MCL 600.2912b(4).[47]

Bush is inapplicable to the present circumstances. At the outset we note that the holding in *Bush* that a defective yet timely NOI could toll the statute of limitations simply does not apply here because CCA never received a timely, albeit defective, NOI. More importantly, and contrary to the dissent's analysis, the facts at issue do not trigger application of MCL 600.2301. That statute states:

> The court *in which any action or proceeding is pending*, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties. [Emphasis added.]

(a) The factual basis for the claim.

(b) The applicable standard of practice or care alleged by the claimant.

(c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.

(d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

[47] *Bush*, 484 Mich at 176-178. In doing so, the *Bush* majority questioned precedent set forth in *Roberts*, 466 Mich at 57, and *Boodt v Borgess Med Ctr*, 481 Mich 558; 751 NW2d 44 (2008). See *Bush*, 484 Mich at 165-170, 175 n 34; *id*. at 190-192, 199-200 (MARKMAN, J., dissenting).

By its plain language, MCL 600.2301 only applies to actions or proceedings that are *pending*.[48] Here, plaintiff failed to commence an action against CCA before the six-month discovery period expired, and his claim was therefore barred by the statute of limitations. "An action is not 'pending' if it cannot be 'commenced' . . . ."[49] In *Bush*, however, this Court explained that an NOI is part of a medical malpractice "proceeding."[50] The Court explained that, "[*s*]*ince an NOI must be given before a medical malpractice claim can be filed*, the service of an NOI is a part of a medical malpractice 'proceeding.' As a result, [MCL 600.2301] applies to the NOI 'process.' "[51] Although plaintiff gave CCA an NOI, he could not file a medical malpractice claim against CCA because the six-month discovery period had already expired. Service of the NOI on CCA could not, then, have been part of any "proceeding" against CCA because plaintiff's claim was already time-barred when he sent the NOI. A proceeding cannot be pending if it was time-barred at the outset. Therefore, MCL 600.2301 is inapplicable because there was no action or proceeding pending against CCA in this case.

Moreover, amendment of the original NOI to allow plaintiff to add CCA would not be " 'for the furtherance of justice' " and would affect CCA's "substantial rights."[52] Every defendant in a medical malpractice suit is entitled to a timely NOI. The legislative purpose behind the notice requirement "was to provide a mechanism for 'promoting settlement without the need for formal litigation, reducing the cost of medical malpractice litigation, and providing compensation for meritorious medical malpractice

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[48] *Boodt*, 481 Mich at 563 n 4.

[49] *Bush*, 484 Mich at 195 (MARKMAN, J., dissenting).

[50] *Id*. at 176.

[51] *Id*. at 176-177 (emphasis added).

[52] *Id*. at 177, quoting MCL 600.2301.

claims that would otherwise be precluded from recovery because of litigation costs . . . .' "[53] Applying MCL 600.2301 in the present case would deprive CCA of its statutory right to a timely NOI followed by the appropriate notice waiting period, and CCA would be denied an opportunity to consider settlement. CCA would also be denied its right to a statute-of-limitations defense. These outcomes are plainly contrary to, and would not be in furtherance of, the Legislature's intent in enacting MCL 600.2912b.

In addition, allowing a claimant to amend an original NOI to add nonparty defendants conflicts with the statutory requirements that govern the commencement of a medical malpractice action and tolling of the statute of limitations. MCL 600.2912b(1) states that

> *a person shall not commence an action alleging medical malpractice* against a health professional or health facility *unless the person has given the health professional or health facility written notice* under this section not less than 182 days before the action is commenced. [Emphasis added.]

We have construed this provision as containing a dual requirement: A plaintiff must (1) submit an NOI to *every* health professional or health facility before filing a complaint[54] and (2) wait the applicable notice waiting period with respect to each defendant before he or she can commence an action.[55] A plaintiff has the burden of ensuring compliance with these mandates.[56] With regard to the requirement that a plaintiff provide every defendant an NOI during the applicable limitations period before filing a complaint, nothing in *Bush* elimi-

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[53] *Id*. at 174, quoting Senate Legislative Analysis, SB 270, August 11, 1993; House Legislative Analysis, HB 4403 to 4406, March 22, 1993.

[54] See *Omelenchuk v City of Warren*, 461 Mich 567, 572; 609 NW2d 177 (2000); *Potter*, 484 Mich at 402-403.

[55] *Burton*, 471 Mich at 752-754.

[56] *Id*. at 753, citing *Roberts*, 466 Mich at 66.

nates this requirement. Permitting amendment to add time-barred nonparty defendants to an original NOI on the basis of *Bush* would render the NOI requirement meaningless and the provision pertaining to nonparty defendants, MCL 600.2912b(3), nugatory.[57]

Nor does *Bush* compel the conclusion that a plaintiff can add a nonparty defendant and avoid compliance with the notice waiting period by simply amending the original NOI. As we explained in *Burton*, when a plaintiff fails to strictly comply with the notice waiting period under MCL 600.2912b, his or her prematurely filed complaint fails to commence an action that tolls the statute of limitations.[58] The plaintiff in *Burton* underwent abdominal surgery at the defendant hospital and suffered complications allegedly caused by the defendants' negligence.[59] The plaintiff sent the defendants an NOI and, 115 days later, filed a complaint.[60] After the statute of limitations expired, the defendants moved for summary disposition and argued that the plaintiff had failed to comply with the notice waiting period under MCL 600.2912b.[61] The defendants argued that the premature complaint failed to toll the statute of limitations, and we agreed.[62] We parsed the language of MCL 600.2912b and explained that it "unequivocally provides that a person 'shall not' commence an action alleging medical malpractice against a health profes-

[57] See *State Farm Fire & Cas Co v Old Republic Ins Co*, 466 Mich 142, 146; 644 NW2d 715 (2002) ("Courts must give effect to every word, phrase, and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory.").

[58] *Burton*, 471 Mich at 753.

[59] *Id*. at 747.

[60] *Id*. at 748.

[61] *Id*. at 749.

[62] *Id*.

sional or health facility until the expiration of the statutory notice period."[63] We stated:

> The directive in [MCL 600.2912b(1)] that a person "shall not" commence a medical malpractice action until the expiration of the notice period is similar to the directive in [MCL 600.2912d(1)] that a plaintiff's attorney "shall file with the complaint an affidavit of merit . . . ." Each statute sets forth a prerequisite condition to the commencement of a medical malpractice lawsuit. *The filing of a complaint before the expiration of the statutorily mandated notice period is no more effective to commence a lawsuit than the filing of a complaint without the required affidavit of merit.* In each instance, the failure to comply with the statutory requirement renders the complaint insufficient to commence the action.[64]

In sum, the significance of *Burton* is that a plaintiff cannot commence an action that tolls the statute of limitations against a particular defendant until the plaintiff complies with the notice-waiting-period requirements of MCL 600.2912b.

Nothing in *Bush* altered our holding in *Burton*.[65] The central issue in *Bush* involved the effect an NOI had on tolling when the NOI failed to comply with the *content* requirements of MCL 600.2912b(4).[66] The central issue

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[63] *Id*. at 752. The Court's holding in *Burton* that a plaintiff cannot commence his or her action until the notice period has expired was unanimous. See *id*. at 758, 762-764, 766-767 (KELLY, J., dissenting).

[64] *Id*. at 753-754 (majority opinion) (emphasis added).

[65] We decline plaintiff's invitation to depart from well-settled precedent and overrule *Burton*. Rather, we adhere to the doctrine of stare decisis. See *Robinson v Detroit*, 462 Mich 439, 463; 613 NW2d 307 (2000) ("Stare decisis is generally 'the preferred course because it promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.' "), quoting *Hohn v United States*, 524 US 236, 251; 118 S Ct 1969; 141 L Ed 2d 242 (1998).

[66] *Bush*, 484 Mich at 164-172.

in *Burton* involved the effect the plaintiff's failure to comply with the *notice-waiting-period* requirements had on tolling. Indeed, the *Bush* Court repeatedly emphasized that the focus of MCL 600.5856(c) is compliance with the notice waiting period set forth in MCL 600.2912b.[67] In contrast to placing doubt on the viability of *Burton*, this aspect of *Bush* aligned with *Burton*'s holding that a plaintiff must comply with the notice waiting period to ensure the complaint tolls the statute of limitations.[68]

Additional concerns support our conclusion that a plaintiff cannot amend an originally filed NOI to add a nonparty defendant. Not only would such a rule be contrary to the plain language of the statutory provisions at issue, but it would create a situation permitting endless joinder of nonparty defendants. Plaintiff would have us allow a claimant in a malpractice action to preserve claims against an infinite number of potential nonparty defendants by simply submitting an NOI to a single defendant. This would absolve a plaintiff of his or her statutory burden to preserve tolling in accord with the prerequisites explained in *Burton*. Absent the statu-

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[67] *Id*. at 169-170.

[68] Indeed, *Bush* repeatedly recognized that NOI must be timely filed. See, for example, *Bush*, 484 Mich at 161 ("[T]he current statute, [MCL 600.5856(c)], makes clear that the question whether tolling applies is determined by the timeliness of the NOI."); *id*. ("[I]f an NOI is timely, the statute of limitations is tolled . . . ."); *id*. at 169 ("[T]he focus of the new [MCL 600.5856(c)] is unquestionably limited to compliance with the 'applicable notice period.' "); *id*. ("[I]f a plaintiff complies with the applicable notice period before commencing a medical malpractice action, the statute of limitations is tolled."); *id*. at 170 ("[A] plaintiff's NOI must comply only with the applicable notice period."); *id*. at 172 ("The plain language of [MCL 600.2912b(1)] mandates that a plaintiff shall not commence an action for medical malpractice without filing a timely NOI."); *id*. at 184 ("If a court ultimately determines that the [defendant's] response is not defective, plaintiff's complaint [filed 154 days, rather than 182 days after the NOI] may be deemed untimely.").

tory mechanisms governing tolling, a claimant could continually add nonparty defendants to an existing action for an undefined amount of time. This result is contrary to the plain language of MCL 600.2912b and MCL 600.5856(c).

Moreover, amendment and relation back would defeat the very principles underlying limitations periods. In *Moll v Abbott Laboratories*[69] we explained that

> [s]tatutes of limitations are intended to compel the exercise of a right of action within a reasonable time so that the opposing party has a fair opportunity to defend; to relieve a court system from dealing with stale claims, where the facts in dispute occurred so long ago that evidence was either forgotten or manufactured; and to protect potential defendants from protracted fear of litigation.[70]

Were a plaintiff able to continually add nonparty defendants to a malpractice action, the nonparty defendants would be exposed to protracted fear of litigation and plaintiffs would not be compelled to promptly prosecute claims once they submitted an NOI to a single defendant. Nonparty defendants would not be provided a fair opportunity to defend against claims, as the facts underlying the claim could have occurred long before the party was added to the suit. Courts would be required to shepherd stale claims through their dockets, which could result in delay and docket congestion. We decline to adopt such a radical departure from the Legislature's carefully crafted framework that governs commencement and tolling in a medical malpractice suit.

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[69] *Moll v Abbott Laboratories*, 444 Mich 1, 14; 506 NW2d 816 (1993).

[70] *Id*., quoting *Bigelow v Walraven*, 392 Mich 566, 576; 221 NW2d 328 (1974) (quotation marks omitted).

C. MCL 600.2957(2) DOES NOT SAVE PLAINTIFF'S CLAIM

Plaintiff also contends that application of MCL 600.2301 in this case is necessary to ensure that a medical malpractice claimant whose claim is governed by the six-month discovery rule can subsequently add a nonparty at fault under MCL 600.2957(2). MCL 600.2957(2) provides:

> Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. *A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action*. [Emphasis added.]

With respect to the present case, the key language in this provision allows a party to add a defendant to an action if the claim against the new defendant *would not have been time-barred* "*at the time of the filing of the original action*."[71] Plaintiff commenced the original action against Dr. Naini and MCA in October 2006. At that time, the statute of limitations had long since expired with respect to CCA. As noted earlier, the complaint was timely with respect to Dr. Naini and MCA because plaintiff sent those defendants an NOI that tolled the statute of limitations. That NOI did not

[71] The dissent misconstrues this language as creating an independent cause of action or an additional limitations period. *Post* at 273 (stating that MCL 600.2957(2) "creates its own 91-day window in which a plaintiff can bring a claim against the identified nonparty at fault"). However, a closer reading of the statutory language reveals that it does not create an independent cause of action or limitations period. Rather, the statute allows a plaintiff to utilize the original filing to add a nonparty at fault *if and only if* the plaintiff's claim against the nonparty defendant *would not have been barred at the time of the filing of the original action*. MCL 600.2957(2).

toll the statute of limitations with respect to CCA. Hence, plaintiff could not add CCA pursuant to MCL 600.2957(2) because plaintiff's claim against CCA would have been barred at the time the original action was filed.[72]

Plaintiff contends that the notice waiting period will always serve to exhaust the six-month limitations period applicable to a claim governed by the discovery rule. Plaintiff argues that it is necessary that he be able to amend his original NOI in order to avail himself of the provisions of MCL 600.2957(2). Plaintiff's argument is unpersuasive for two reasons: first, a claimant can toll the six-month limitations period by filing an NOI before that limitations period expires; second, as articulated earlier, allowing plaintiff to amend the original NOI so that he or she can add a nonparty under MCL 600.2957(2) runs counter to the legislative framework governing commencement of and tolling in malpractice actions. We cannot ignore the plain language of MCL 600.2912b to permit a plaintiff to utilize MCL 600.2957(2) under the present circumstances.[73]

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[72] The dissent states that we erroneously conclude that plaintiff cannot use the 91-day window under MCL 600.2957(2) "because plaintiff did not provide an NOI to CCA six months before filing the original action." *Post* at 274. The dissent wrongly asserts that our holding renders "an entire provision of the [statute] . . . . nugatory" and runs counter to "the intent of the Legislature . . . ." *Post* at 274-275. As we explained earlier, MCL 600.2957(2), MCL 600.2912b(3), and MCR 2.112(K)(4) all work in concert to allow a plaintiff to add a nonparty to an existing malpractice action. Unlike the dissent, we will adhere to the plain language of the statute because we believe it is the best indicator of the Legislature's intent. See *Danse Corp*, 466 Mich at 181-182. Under the plain language of MCL 600.2957(2), plaintiff simply cannot add CCA to the action because his claim with regard to CCA was time-barred at the time he originally filed an action against Dr. Naini and MCA.

[73] See *Danse Corp*, 466 Mich at 181-182.

Moreover, we presume the Legislature was aware of the nuance between adding a nonparty at fault under MCL 600.2957(2) and the notice waiting period under MCL 600.2912b (i.e., that the 182-day waiting period virtually engulfs the discovery rule's six-month limitations period) when it enacted MCL 600.2957 in 1995 PA 161 as part of the 1995 tort reform legislation.[74] Further, in enacting the tort reform legislation, the Legislature eliminated joint and several liability in tort actions *with the exception of medical malpractice suits*.[75] As joint and several liability remains the rule, inclusion of all potential parties in a medical malpractice action is not necessary in order for a plaintiff to secure full recovery.

V. RESPONSE TO THE DISSENT

Although the dissent accuses the majority of misinterpreting the statutes at issue, it is obvious from the dissent's dire attempt to save plaintiff's claim that it is in fact the dissent that misconstrues the statutory framework governing medical malpractice claims. Central to the dissent's flawed analysis is its failure to recognize that plaintiff's claims against CCA, MCA, and Dr. Naini accrued at the same time when plaintiff discovered the negligent act and were governed by the same six-month limitations period. Thus, when plaintiff failed to provide CCA an NOI within that six-month period, plaintiff's claim became time-barred. The dissent, however, erroneously posits that plaintiff's claim accrued against CCA when plaintiff learned that CCA

[74] See *Walen v Dep't of Corrections*, 443 Mich 240, 248; 505 NW2d 519 (1993) ("It is a well-known principle that the Legislature is presumed to be aware of, and thus to have considered the effect on, all existing statutes when enacting new laws").

[75] See MCL 600.2956; MCL 600.6304.

might be vicariously liable. This conclusion is wholly unsupported by law and ignores the statutory framework governing claim accrual. Receipt of notice of a nonparty at fault under MCL 600.2957(2) is irrelevant to determining the date of accrual of a medical malpractice claim.[76] Nor did MCL 600.2957(2) provide plaintiff with an additional 91 days in which to commence an action against the nonparty defendant, as the dissent asserts. As we have explained, that provision, by its plain language, is not a tolling provision, nor does it otherwise provide an additional basis on which to bring a claim.

Moreover, the dissent overlooks the significance of *Burton*. Plaintiff failed to comply with the 91-day notice waiting period under MCL 600.2912b(3) after he sent CCA an NOI. Pursuant to *Burton*, the premature complaint failed to commence an action that tolled the statute of limitations, and his claim was time-barred when the Court of Appeals issued its opinion and order

[76] The dissent erroneously claims that this assertion "is contrary to any logical reading of the discovery rule." *Post* at 272 n 13. However, this is not so under the plain language of the statutory rules governing claim accrual. Although we have already explained the statutory framework governing claim accrual in detail, we once again make this point: a medical malpractice claim accrues "at the time of the act or omission that is the basis for the claim . . . *regardless of the time the plaintiff discovers or otherwise has knowledge of the claim*." MCL 600.5838a(1) (emphasis added). When a plaintiff learns of an alleged negligent act or omission that will form the basis of his or her claim two or more years after its occurrence, that plaintiff has six months from that point forward to commence an action against *all defendants* who are responsible for the alleged negligent act or omission, including defendants who are vicariously liable. MCL 600.5838a(2). Contrary to the dissent's erroneous assertion, under MCL 600.5838a(2), a plaintiff does not have a new six-month discovery period every time he or she learns of a new nonparty at fault. MCL 600.5838a(2). Thus, it is the dissent's, not the majority's, construction of MCL 600.5838a(2) that is "contrary to any logical reading" of the plain language of that provision.

reversing the circuit court's order denying CCA's motion for summary disposition and remanding the case to the circuit court for the entry of an order of summary disposition in CCA's favor. Although the dissent claims that *Burton* is inapplicable to the present case, the dissent would essentially overrule *Burton* and disregard the notice-waiting-period requirements mandated by MCL 600.2912b. Unlike the dissent, we will adhere to the plain language of MCL 600.2912b and binding precedent established in *Burton*.

Finally, the dissent's attempt to save plaintiff's claim through reliance on MCL 600.2301 is unavailing. As we previously stated, MCL 600.2301 does not apply in this case because it only applies in actions or proceedings that are "pending." Plaintiff's claim with regard to CCA was time-barred from the outset; hence, it was not "pending" because it could not be commenced.[77] While the dissent acknowledges that amendment under MCL 600.2301 would deprive CCA of the period permitted for the parties to attempt to settle the claim, it concludes that deprivation of this period would not affect CCA's substantial rights because there is no indication that CCA would have settled the claim. The dissent further posits that, because plaintiff "attempted to follow the applicable procedural requirements" for adding a nonparty at fault, allowing amendment under MCL 600.2301 would be "in the furtherance of justice."[78] However, the dissent's eagerness to do away with the statutory framework governing notice, limitations periods, and claim accrual simply because plaintiff "attempted" to comply with MCL 600.2957(2) amounts to nothing more than an effort to judicially toll the statute

[77] See *Bush*, 484 Mich at 195 (MARKMAN, J., dissenting) ("An action is not 'pending' if it cannot be 'commenced . . . .' ").

[78] *Post* at 279-280.

of limitations applicable to CCA by permitting plaintiff to amend the original NOI under MCL 600.2301.

VI. CONCLUSION

Plaintiff failed to commence an action against CCA before the statutory limitations period expired and his amended complaint was time-barred. Plaintiff was not entitled to amend his original NOI and preserve tolling with regard to CCA because that would be counter to the legislative framework governing commencement of and tolling in a medical malpractice action. Because entry of summary disposition in CCA's favor was warranted, we affirm the result reached by the Court of Appeals only and reverse the Court of Appeals' judgment in all other respects.

YOUNG, C.J., and MARKMAN and ZAHRA, JJ., concurred with MARY BETH KELLY, J.

YOUNG, C.J. (*concurring*). Although the majority opinion correctly recognizes that *Potter v McLeary* controls whether a medical malpractice claimant must serve a notice of intent (NOI) on a professional corporation (PC) before initiating a lawsuit,[1] I continue to adhere to my partial dissent in *Potter*.[2] Nevertheless, I join the majority opinion because it faithfully applies the rule established in *Potter* and because the jurisprudence of this state benefits from having a clear majority rule of law in this case.[3]

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[1] See *ante* at 247, citing *Potter v McLeary*, 484 Mich 397, 402-403; 774 NW2d 1 (2009).

[2] *Potter*, 484 Mich at 431 (YOUNG, J., concurring in part and dissenting in part).

[3] I note, additionally, that application of my partial dissent in *Potter* to the facts of this case would yield an identical result. MCL 600.2912b

HATHAWAY, J. (*dissenting*). This case addresses the procedural requirements imposed on medical malpractice actions by the notice of intent (NOI) statute[1] and the notice of nonparty fault (NNPF) statute.[2] At issue are the statutory time requirements for adding a defendant, who has been identified as a nonparty at fault, to a pending medical malpractice action. The majority holds that plaintiff's action against the identified nonparty at fault, Cardiovascular Clinical Associates, P.C. (CCA), must be dismissed with prejudice because it was not commenced before the expiration of the period of limitations. The majority also opines that plaintiff is not entitled to amend his original NOI. I respectfully dissent because the majority has incorrectly interpreted the relevant statutes, including the applicable statutes of limitations.[3]

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requires a medical malpractice plaintiff to serve an NOI on every potential defendant "health facility" and "health professional" a specified number of days before filing its lawsuit. Because a PC is neither a "health facility" nor a "health professional," it is not entitled to receive an NOI before being sued. Accordingly, under my partial dissent in *Potter*, defendant Cardiovascular Clinical Associates, P.C. (CCA), would not be entitled to dismissal on this basis.

Nevertheless, under my partial dissent in *Potter*, CCA would be entitled to summary disposition on statute of limitations grounds. Pursuant to the nonparty fault statute, MCL 600.2957(2), a new claim "is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action." In this case, at the time of the filing of the original action, plaintiffs acknowledge that they were already outside the 6-month discovery period of limitations applicable in the instant case. Moreover, they cannot avail themselves of tolling from the date of the original NOI (which tolled the running of the period of limitations with regard to the originally named defendants) because NOI tolling "is expressly claim specific" in that the tolling statute, MCL 600.5856(c), "restates what is tolled ('the statute'), which specifies that tolling is limited to only one statute . . . ." *Potter*, 484 Mich at 444 (YOUNG, J., concurring in part and dissenting in part).

[1] MCL 600.2912b.

[2] MCL 600.2957(2).

[3] MCL 600.5805(6) and MCL 600.5838a(2).

Plaintiff Willie Driver's original complaint alleging medical malpractice was filed against defendant Mansoor Naini, M.D., and his employer, defendant Michigan Cardiology Associates, P.C. (MCA), on October 23, 2006.[4] The lawsuit alleged that plaintiff was treated by Dr. Naini for approximately 22 years, and his last visit was in October 2005. Plaintiff alleged that after he reached the age of 50, Dr. Naini failed to perform any routine colon cancer screening, despite plaintiff's age and the fact that he had a family history of colon cancer. Plaintiff further alleged that in November 2005 he was diagnosed with stage IV colon cancer with metastasis to the liver and that, if Dr. Naini had performed routine screening, plaintiff's cancer would have been diagnosed at a much earlier stage.

On January 15, 2007, MCA and Dr. Naini identified CCA as a nonparty at fault. The NNPF set forth the following:

> Although Defendants have denied and continue to deny any claimed violations of the standard of practice in regard to the care and treatment rendered or allegedly rendered to Wiliie [sic] Driver, it is believed that Mansoor C. Naini, M.D., was an employee and or agent of Cardiovascular Clinical Associates, P.C., during the times called into question by the plaintiffs. Thus, to the extent that the plaintiff's allegations are true, and those allegations have been and continue to be denied, Cardiovascular Clinical Associates, P.C., is or may be legally responsible, pursuant to the legal doctrine of respondeat superior or vicarious liability, for any and all alleged acts of professional negligence of its agent, actual and/or ostensible, servants and or employee, Mansoor C. Naini, M.D. Specifically, the alleged failure to recommend that Mr. Driver undergo a routine colonoscopy

[4] There are two plaintiffs in this case, Willie Driver and his wife, Beverly Driver. The majority uses the singular term "plaintiff" because Beverly Driver's claims are derivative of Willie Driver's claims. To avoid confusion, I will also use the singular term "plaintiff."

> once he reached the age of 50 and/or failing to follow up on allegedly abnormal lab values, such as an elevated [carcinoembryonic antigen level].

In response to receiving this notice, plaintiff provided an NOI to CCA on February 1, 2007. Plaintiff also filed a motion to amend his complaint to add CCA as a defendant and filed suit against CCA on March 22, 2007. The majority holds that plaintiff's NOI and complaint against CCA were untimely. I disagree.

To determine whether plaintiff's NOI and complaint against CCA were timely, we must consider the NOI and NNPF statutes, as well as the applicable statutes of limitations.[5] Given that this action was filed against CCA as a result of its designation as a nonparty at fault, the proper starting point for our analysis is the NNPF statute, MCL 600.2957. That statute provides:

> (1) In an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each person shall be allocated under this section by the trier of fact and, subject to [MCL 600.6304], in direct proportion to the person's percentage of fault. In assessing percentages of fault under this subsection, the trier of fact shall consider the fault of each person, regardless of whether the person is, or could have been, named as a party to the action.

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[5] In examining a statute, we follow the established rules of statutory construction. The purpose of statutory construction is to discern and give effect to the intent of the Legislature. *Potter v McLeary*, 484 Mich 397, 410; 774 NW2d 1 (2009), citing *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999). In doing so, we first look to the actual language of the statute. *Potter*, 484 Mich at 410. If a statute is clear and unambiguous, it must be enforced as written and no further judicial construction is allowed. *Sun Valley*, 460 Mich at 236. Further, a statute must be read as a whole, and while individual words and phrases are important, the words and phrases should be read in the context of the entire legislative scheme. *Herman v Berrien Co*, 481 Mich 352, 366; 750 NW2d 570 (2008).

> (2) Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action.
>
> (3) [MCL 600.2956 to 600.2960] do not eliminate or diminish a defense or immunity that currently exists, except as expressly provided in those sections. Assessments of percentages of fault for nonparties are used only to accurately determine the fault of named parties. If fault is assessed against a nonparty, a finding of fault does not subject the nonparty to liability in that action and shall not be introduced as evidence of liability in another action.

As evidenced by the plain language of the statute, its purpose is to allow the trier of fact to assess the appropriate percentage of fault attributable to each of the named parties in an action. In order to accomplish this, the statute allows parties to identify nonparties as liable, so that a nonparty's proportionate share of responsibility may be determined. The trier of fact determines the percentage of fault of the parties and nonparties at the time of trial. If a nonparty is assessed a percentage of fault, that percentage is not awarded to the plaintiff because a "finding of fault does not subject the nonparty to liability in that action . . . ."[6] However, if a nonparty is identified, the plaintiff may choose to add the nonparty as a named defendant to the suit.

MCL 600.2957(2) sets forth the procedural requirements imposed on a plaintiff who chooses to add an identified nonparty to a suit. "Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an

[6] MCL 600.2957(3).

amended pleading alleging 1 or more causes of action against that nonparty."[7] Further, the statute sets forth a framework to allow a plaintiff to bring a claim that may otherwise be barred by a statute of limitations. "A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action."[8] Thus, for purposes of calculating the period of limitations, a plaintiff who adds a nonparty as a named defendant stands in the same position as he would have on the date of the original filing.

There is no dispute in this case that plaintiff met the first requirement of the NNPF statute when he filed a motion to add CCA as a party within 91 days of CCA being identified as a nonparty at fault. The first disputed issue is whether the period of limitations applicable to plaintiff's claim against CCA had already expired when plaintiff's original action was filed. The majority holds that the suit against CCA was time barred because it would have been untimely when plaintiff's original action was filed. I disagree because the majority errs in its calculation of the applicable periods of limitations. The correct calculations require three separate analyses.

Medical malpractice actions are governed by a two-year statute of limitations[9] and the period of limitations is tolled when an NOI is mailed.[10] Plaintiff's claim against CCA is premised on CCA's alleged vicarious liability for the acts of Dr. Naini.[11] According to the medical records

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[7] MCL 600.2957(2).

[8] *Id*.

[9] MCL 600.5805(6).

[10] See MCL 600.5856(c); MCL 600.2912b.

[11] The NNPF did not identify specific dates and merely stated, "[I]t is believed that Mansoor C. Naini, M.D., was an employee and or agent of Cardiovascular Clinical Associates, P.C., during the times called into question by the plaintiffs."

in this case, plaintiff's treatment with Dr. Naini spanned a 22-year period ending on Oct 18, 2005. Plaintiff provided CCA with an NOI on February 1, 2007. Thus, plaintiff may proceed with a claim of malpractice for any acts of negligence occurring after February 1, 2005, by virtue of the two-year period of limitations without relying on the discovery rule or the NNPF statute.

According to the medical records, Dr. Naini treated plaintiff on three occasions between February 1, 2005, and November 2005, at which time plaintiff's cancer was diagnosed.[12] Plaintiff alleges that Dr. Naini committed malpractice by failing to perform screening on each date that he treated plaintiff. Thus, the majority errs by assuming that the general two-year period of limitations had expired with regard to all of plaintiff's claims at the time the original action was filed. While claims arising from treatments before February 1, 2005, may have been barred by the two-year statute of limitations, claims for acts of negligent treatment after that date are not. Accordingly, there is no question that at least portions of plaintiff's claim against CCA were timely.

Further, MCL 600.5838a(2) provides an extension of the period of limitations when a claim is newly discovered:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in [MCL 600.5805] or [MCL 600.5851 to 600.5856] or within 6 months after the plaintiff discovers or should have discovered the existence of the claim,

[12] Dates of visits shown in the medical records include April 4, 2005, April 18, 2005, and October 18, 2005. Plaintiff's second amended complaint alleged that CCA was Dr. Naini's employer on these dates. While it is doubtful that screening on October 18, 2005, would have been beneficial, a question of fact exists regarding whether screening would have been beneficial during plaintiff's April 2005 visits.

> whichever is later. However, except as otherwise provided in [MCL 600.5851(7)] or (8), the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. The burden of proving that the plaintiff, as a result of physical discomfort, appearance, condition, or otherwise, neither discovered nor should have discovered the existence of the claim at least 6 months before the expiration of the period otherwise applicable to the claim is on the plaintiff. A medical malpractice action that is not commenced within the time prescribed by this subsection is barred.

A newly discovered claim is afforded its own six-month period of limitations that begins to run at the time the claim is discovered, assuming the plaintiff meets the requirements of the statute.[13] In this case, plaintiff alleges that he was unaware of the claim against CCA until he received the NNPF on January 15, 2007. Assuming plaintiff meets his burden of proving that he "should not have discovered" the existence of the claim against CCA at an earlier date, plaintiff's claim against CCA is governed by the six-month period of limitations, subject to a six-year statute of repose.[14]

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[13] Curiously, the majority states that "[r]eceipt of notice of a nonparty at fault under MCL 600.2957(2) is irrelevant to determining the date of accrual of a medical malpractice claim." *Ante* at 263. This statement is contrary to any logical reading of the discovery rule. Obviously, the accrual date for a newly discovered claim is the date the claim was discovered.

[14] Plaintiff and defendant dispute whether plaintiff should have known of the claim against CCA at an earlier date. Plaintiff states that he was unaware of any employer other than MCA until he received the NNPF. Defendant counters that the medical records make reference to CCA, putting plaintiff on notice of the claim against CCA. However, mere reference to an entity in medical records may not necessarily put a plaintiff on notice of a claim. The claim at issue involves a claim for respondeat superior, which requires knowledge of a legal relationship between the parties. Legal relationships in a medical setting can be complex and can range from independent contractor agreements to traditional employment agreements to no legal relationship whatsoever.

Importantly, however, the issue of whether plaintiff should have known of the existence of the claim against CCA before January 15, 2007, has not yet been considered or decided by the trial court. At the hearing on CCA's motion for summary disposition, the trial court only ruled on whether plaintiff was able to rely on the NNPF statute when filing his claim against CCA. The trial court did not rule on the question whether plaintiff should have known of the claim against CCA at an earlier date. Thus, it is premature for this Court to decide whether plaintiff can avail himself of the discovery rule without remanding this issue to the trial court for further fact-finding.[15]

Moreover, the NNPF statute creates its own 91-day window in which a plaintiff can bring a claim against the identified nonparty at fault, as long as the claim would have been timely on the date that the original action was filed. This 91-day window is applicable whether the claim is known or unknown. In this case, the original action against Dr. Naini and MCA was filed on October 23, 2006. Using the date of the original filing, any claims arising out of malpractice committed after October 23, 2004, are timely. The medical records show that plaintiff treated with Dr. Naini four times after October 23, 2004.[16] Clearly, portions of plaintiff's

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Moreover, the nature of the relationship between a provider and the building where services are rendered or corporate names in charts are generally only within the defendant's knowledge. Thus, plaintiff's claim that he was unaware of the existence of the claim against CCA is not unreasonable on its face.

[15] See *Blair v Wayne State Univ*, 393 Mich 769 (1974) (peremptorily reversing the Court of Appeals when the issue was not tried or considered by the trial court because the defendants were entitled to an opportunity to be heard.)

[16] This period covers one additional date, January 17, 2005, in addition to those noted in footnote 12 of this opinion.

claim are timely in light of the NNPF look-back period and the two-year statute of limitations.

Further, an additional analysis is required under the NNPF statute because plaintiff's original claim was based in part on the discovery rule.[17] Therefore, we must also determine whether the NNPF 91-day window allowed plaintiff to rely on the discovery rule, applicable to his original claim, in order to avoid the statute-of-limitations defense with regard to his claim against CCA.

The majority erroneously asserts that plaintiff cannot use the NNPF 91-day window because plaintiff did not provide an NOI to CCA six months before filing the original action. However, the majority errs in this analysis. Under this reasoning, no plaintiff who brings a malpractice lawsuit under the discovery rule can ever use the NNPF statute to bring a claim against an identified nonparty at fault because no plaintiff will ever have provided an NOI to a nonparty at fault six months before filing the original suit.[18] This reasoning renders an entire provision of the NNPF statute, the provision allowing plaintiffs to file claims against non-

[17] Plaintiff alleged in the original action that he did not know, and could not have known, of the existence of the claim until his cancer was diagnosed in November 2005.

[18] To exacerbate this issue, there is no way for a plaintiff to definitively identify which NOI waiting period he or she is required to follow before filing suit and no way to comply with a six-month waiting period. For instance, to the extent that a plaintiff relies on the discovery rule, the NOI waiting period is 91 days. MCL 600.2912b(3). However, plaintiffs may only avail themselves of the 91-day NOI waiting period if they should not have known of the claim at an earlier date. *Id.* While a plaintiff may believe he or she is entitled to rely on the discovery rule before filing suit, the trial court will not rule on the issue until after the lawsuit is filed. Most importantly, assuming a plaintiff is required to use the 182-day rule and waits 182 days before filing, the six-month period of limitations will have expired.

parties at fault, nugatory. This clearly was not the intent of the Legislature and violates the basic tenets of statutory construction.

The majority fails to recognize that the NNPF statute creates it own 91-day window in which to bring claims against identified nonparties at fault. If the majority's reasoning were correct, and a plaintiff were not afforded the opportunity to start his or her claim by providing an NOI to the nonparty at fault during the 91-day window, the NNPF and NOI statutes would be in irreconcilable conflict.[19] If the statutes conflict, as the Court of Appeals held, we would need to determine which statute is more specific.[20] If the NOI statute is the more specific statute, the proper resolution is to disallow use of the NNPF statute in malpractice cases altogether, not just to limit use of the NNPF statute to one party. If the NNPF statute is the more specific statute, we would need to consider whether the NOI waiting periods are applicable to malpractice claims because the Legislature failed to address them in the NNPF statute. However, before declaring that an irreconcilable conflict exists, we must determine whether there is a way to harmonize these statutes in the case before us.[21]

To determine whether there is a way to read the statutes harmoniously, we must examine whether plaintiff was required to provide CCA an NOI and, if so, what the applicable waiting period was. We must also resolve whether dismissal is required because plaintiff's

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[19] When two legislative enactments conflict, the more specific enactment controls. *Frame v Nehls*, 452 Mich 171, 176 n 3; 550 NW2d 739 (1996).

[20] *Id*.

[21] If statutes lend themselves to a harmonious construction, that construction controls. *In re Project Cost & Special Assessment Roll for Chappel Dam*, 282 Mich App 142, 148; 762 NW2d 192 (2009).

complaint was filed too early, as the Court of Appeals concluded.[22] I find that these statutes can be read harmoniously, but only when read in concert with MCL 600.2301.[23] Therefore, I disagree with the Court of Appeals' conclusion that, because plaintiff filed "too early" against CCA, his complaint must be dismissed.

The NOI statute, MCL 600.2912b, requires that plaintiffs must provide medical malpractice defendants an NOI before filing suit. It also mandates different waiting periods, depending on the circumstances, before a plaintiff may file suit. Providing an NOI does not pose a conflict with the NNPF statute on its face; however, under the majority's analysis, the waiting periods do. The NOI statute provides a waiting period of 182 days for defendants known before the plaintiff files suit,[24] a 91-day waiting period when suit is filed against a newly discovered defendant during the pendency of the suit,[25] and a 154-day waiting period if the defendant fails to respond to the NOI. Importantly, the statute also allows the defen-

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[22] The majority focuses much of its analysis on whether plaintiff can amend his NOI to add CCA. While amending his NOI is one possible course of action that could provide relief, it is unnecessary to address that issue in this instance. Plaintiff did provide an NOI to CCA before the expiration of the period of limitations. Thus, the primary issues for resolution here are whether plaintiff filed too early and whether MCL 600.2301 provides relief. I will assume arguendo that plaintiff's suit was filed too early in this instance.

[23] All three statutes are part of the same statutory scheme, the Revised Judicature Act, necessitating that they be read together.

[24] MCL 600.2912b(1) provides:

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

[25] MCL 600.2912b(3) provides:

> The 182-day notice period required in subsection (1) is shortened to 91 days if all of the following conditions exist:

dant to forgo the waiting period altogether by indicating in writing that he or she does not wish to settle the claim. MCL 600.2912b(9) provides:

> If at any time during the applicable notice period under this section a health professional or health facility receiving notice under this section informs the claimant in writing that the health professional or health facility does not intend to settle the claim within the applicable notice period, the claimant may commence an action alleging medical malpractice against the health professional or health facility, so long as the claim is not barred by the statute of limitations.

The NNPF statute contains its own time limitation. "Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty."[26] The majority opines that this statute only requires that a motion be filed within 91 days and that the amended pleading adding the nonparty may be filed at some later date. However, this holding is at odds with how this Court has previously interpreted the NNPF statute. Following the adoption of the NNPF statute, this Court adopted MCR 2.112(K)(4) to guide parties on the proper procedure to implement the NNPF statute.

> (a) The claimant has previously filed the 182-day notice required in subsection (1) against other health professionals or health facilities involved in the claim.
>
> (b) The 182-day notice period has expired as to the health professionals or health facilities described in subdivision (a).
>
> (c) The claimant has filed a complaint and commenced an action alleging medical malpractice against 1 or more of the health professionals or health facilities described in subdivision (a).
>
> (d) The claimant did not identify, and could not reasonably have identified a health professional or health facility to which notice must be sent under subsection (1) as a potential party to the action before filing the complaint.

[26] MCL 600.2957(2).

The rule provides: "Amendment Adding Party. A party served with a notice under this subrule may *file an amended pleading* stating a claim or claims against the nonparty *within 91 days of service of the first notice identifying that nonparty*." (Emphasis added.) Because litigants and lower courts are expected to follow these rules, they should also be able to rely on the rules as an accurate representation of this Court's interpretation of the statute that the rule is designed to implement.[27]

Given the lack of clarity in the NNPF statute, the apparent conflict between the NNPF statute and the court rule, and assuming plaintiff's complaint was filed too early, the next question becomes what the appropriate penalty or remedy should be in this circumstance. While the Court of Appeals held that plaintiff's complaint against CCA was filed too early and that it must be dismissed with prejudice, I disagree. The Court of Appeals failed to consider the mandates of MCL 600.2301, which clearly apply in this situation.

MCL 600.2301 provides:

> The court in which any action or proceeding is pending, has power to amend any process, pleading or proceeding in such action or proceeding, either in form or substance, for the furtherance of justice, on such terms as are just, at any time before judgment rendered therein. The court at every stage of the action or proceeding shall disregard any error or defect in the proceedings which do not affect the substantial rights of the parties.

The plain language of this statute imposes a duty, which cannot be ignored, on all courts. It requires that

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[27] The majority now suggests that a malpractice litigant could seek a later amendment under the last sentence of MCR 2.112(K)(4), which states that "[t]he court may permit later amendment as provided in MCR 2.118." Nevertheless, that does not resolve the problem because nothing in MCR 2.118 requires the trial court to grant leave to add the party. Moreover, there is no way for a plaintiff to definitively identify which NOI waiting period he or she is required to follow before filing suit.

"[t]he court at every stage of the action or proceeding *shall disregard any error or defect in the proceedings* which do not affect the substantial rights of the parties." (Emphasis added.) This is not a discretionary provision, but a legislative mandate that courts must follow. In determining whether relief is available under MCL 600.2301, we analyze the two § 2301 factors allowing for a cure.[28] First, we must decide whether a substantial right of a party is implicated. Second, we must decide whether a cure is in the furtherance of justice.

In this instance, plaintiff appears to have attempted to follow the applicable procedural requirements. He timely filed a motion to add CCA as a party. He timely provided an NOI to CCA within the period of limitations. The alleged defect or error in the proceeding is that plaintiff filed his complaint against CCA too soon. However, there is simply no substantial right of a party at stake in this circumstance. At most, CCA was deprived of a short period of time in which it could have attempted to settle the claim. However, CCA has not demonstrated any intent or desire to settle this claim. Furthermore, CCA was not deprived of a substantial right because, as previously demonstrated, plaintiff's suit was not barred by any statute of limitations. Thus, CCA could not have raised a valid statute of limitations defense.

Next, this Court must decide whether a cure would be in the furtherance of justice. I believe that it would be. In *Bush*, we held that the plaintiff's good-faith attempt to comply with the NOI content requirements of MCL 600.2912b justified a cure. Like the plaintiff in *Bush*, plaintiff in this case attempted to follow the procedural requirements for adding a nonparty at fault.

[28] See *Bush v Shabahang*, 484 Mich 156; 772 NW2d 272 (2009).

Given the complexity of the requirements, it can hardly be said that plaintiff intentionally disregarded the applicable statutes. Accordingly, a cure would be in the furtherance of justice. Therefore, MCL 600.2301 can be applied, and plaintiff's claim should not be dismissed with prejudice. Instead, because no substantial right of the parties has been impacted, the error should be disregarded under the plain language of MCL 600.2301.

For these reasons, the majority errs in holding that CCA is entitled to summary disposition and that plaintiff's lawsuit must be dismissed with prejudice. Therefore, I respectfully dissent.

MARILYN KELLY, J., concurred with HATHAWAY, J.

CAVANAGH, J. I concur in the result proposed by Justice HATHAWAY's dissent.

PEOPLE v ARMSTRONG

Docket No. 142762. Decided October 26, 2011.

Richard R. Armstrong was convicted by a jury in the Otsego Circuit Court of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a), for engaging in sexual acts with a 15-year-old girl. Defendant and the complainant had met on three occasions, and she alleged that defendant forced her to submit to acts of sexual penetration on the last two occasions. At trial, the complainant's credibility was a central issue in the defense. The complainant testified that she never communicated with defendant following their third meeting. Defendant's trial counsel confronted the complainant with cell phone records indicating that she had contacted defendant after their third meeting, at which the second alleged sexual assault had occurred, but the complainant unequivocally denied contacting defendant. When defense counsel attempted to introduce defendant's cell phone records into evidence to rebut the complainant's testimony, the prosecutor objected for lack of a foundation and the court, Dennis F. Murphy, J., sustained the objection. Defense counsel made no further efforts to have the records admitted. Following his sentencing, defendant appealed and his appellate counsel moved in the Court of Appeals to remand the case for an evidentiary hearing under *People v Ginther*, 390 Mich 436 (1973), on the issue of ineffective assistance of counsel. Attached was an affidavit by defendant's trial counsel stating that he had intended to offer the cell phone records but failed to subpoena or otherwise make available the custodian of the records to lay a proper foundation for introducing them and that his failure was not a strategic decision. The Court of Appeals denied the motion in an unpublished order, entered January 25, 2007 (Docket No. 272104). The Court, MURRAY, P.J., and HOEKSTRA and WILDER, JJ., subsequently affirmed defendant's convictions and sentences in an unpublished opinion per curiam, issued December 18, 2007 (Docket No. 272104). The Supreme Court vacated the judgment in part and remanded the case to the trial court for a *Ginther* hearing. 482 Mich 891. At the hearing, defendant's trial counsel testified that he had mistakenly believed that the business records exception to the hearsay rule did not

require that a custodian of records testify. He had intended to introduce the cell phone records, but became flustered following the prosecutor's successful objection and made no further attempts. The trial court found that the performance of defendant's trial counsel fell below an objective standard of reasonableness, but concluded that defendant had not suffered prejudice. The Court of Appeals denied defendant's delayed application for leave to appeal in an unpublished order, entered September 8, 2009 (Docket No. 291979), but the Supreme Court remanded the case to the Court of Appeals for consideration as on leave granted, 485 Mich 1132. The Court of Appeals, HOEKSTRA, P.J., and CAVANAGH and BORRELLO, JJ., affirmed in an unpublished opinion per curiam, issued January 8, 2011 (Docket No. 291979), and defendant sought leave to appeal.

In a unanimous opinion by Justice ZAHRA, the Supreme Court, in lieu of granting leave to appeal and without oral argument, *held*:

A defendant seeking a new trial on the basis of the ineffective assistance of trial counsel must show that counsel's performance fell below an objective standard of reasonableness. In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. The defendant must also show that, but for counsel's deficient performance, a different result would have been reasonably probable. The performance of defendant's trial counsel in this case fell below an objective standard of reasonableness. The trial court found that the failure to pursue the admission of the cell phone records did not constitute sound trial strategy. Admission of the records would have caught the complainant in a lie, and an attorney acting reasonably would have moved for their admission, particularly given that attacking the complainant's credibility offered the most promising defense strategy. The conclusion by the trial court and the Court of Appeals that no prejudice resulted from defense counsel's failure was clearly erroneous. Although other evidence introduced at trial attacked the complainant's credibility, including allegations that the complainant had falsely accused her stepfather of sexually assaulting her, the documentary proof suggesting that the complainant lied to this jury in this case would have had more of a tendency to undermine her credibility. A reasonable probability existed that the cell phone records would have convinced the jury to discredit the complainant's accusations. While the jury heard some of the contents of the records read into evidence by the complainant, it was also told to disregard them because they were not properly admitted. Moreover, the jury heard argument from

the prosecutor that defendant or his counsel might have fabricated the records, and the trial court's instructions that the attorneys' arguments are not evidence did not cure that significant accusation.

Reversed and remanded for a new trial.

State Appellate Defender (by *Peter John Van Hoek*) for defendant.

ZAHRA, J. In this case, we consider whether the ineffective assistance of defendant's trial counsel in failing to seek the introduction into evidence of cell phone records that would have undermined the complainant's credibility prejudiced defendant, thereby entitling him to a new trial. The Court of Appeals held that, even assuming that defense counsel's performance fell below an objective standard of reasonableness, defendant had failed to show resulting prejudice. For the reasons stated in this opinion, we disagree and instead hold that defense counsel's ineffective assistance prejudiced defendant. Accordingly, in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals and remand the case to the Otsego Circuit Court for a new trial.

I. FACTS AND PROCEDURAL HISTORY

Defendant, a 25-year-old male, was charged with engaging in sexual acts with the complainant, a 15-year-old girl, on two occasions. At the time of the alleged sexual acts, the complainant was living with her adoptive mother, Barbara Kamae, who is actually the complainant's biological grandmother. The complainant's biological mother, Lisa Annise, gave birth to her at a very young age, and her relationship with the complainant is more like that of a sister. Through Lisa's coworker, Donna Eckles, the complainant became ac-

quainted with defendant, who is Donna's half brother. William Eckles is Donna's husband.

Defendant and the complainant met on three occasions in the spring of 2005. The first meeting took place at defendant's residence, where the complainant spent the night with William, defendant, and Titto, one of defendant's friends. William testified that he remained with the complainant and defendant throughout the entire night because he did not trust her. Following this first meeting, the complainant and defendant spoke frequently over the phone.

The complainant and defendant met for the second time a few weeks later at the home of defendant's uncle. Many others were present, including Donna and William. The complainant testified that she and defendant watched a movie in the basement while the others remained upstairs. According to the complainant, she resisted defendant's advances and eventually went upstairs on the pretext of using the restroom. When she returned to lie down on the couch, defendant allegedly removed the cushions to form a bed on the floor. The complainant claimed that while lying down on the cushions, she attempted to maintain her distance from defendant, but he moved closer to her, tried to kiss her, and asked her to undress. When she refused to comply, defendant allegedly removed the complainant's clothes and forced her to engage in oral and vaginal sex, during which defendant allegedly choked her, slapped her, and made threats against her life. The complainant claimed that the intercourse lasted for more than an hour.

William, however, testified that he remained in the basement with defendant and the complainant nearly the entire night because he did not trust her. According to William, he slept on the floor while defendant and the

complainant slept on one of the couch's foldout beds. William testified that the three of them went to sleep at the same time. He never heard any sexual activity.

Donna recalled the evening somewhat differently. According to Donna, she and the complainant were supposed to share a bed upstairs. When Donna woke up to find the complainant missing, she went downstairs and found the complainant sitting on the arm of the couch attempting to wake defendant. William was also still in the basement. The complainant refused Donna's request that she return upstairs. Following this second meeting, defendant and the complainant continued to communicate by phone calls and text messages.

Defendant and the complainant met for the third and final time at her home. Defendant brought Titto along, and the three of them talked in the living room while Barbara, who was on heavy prescription medication at the time, slept in the recliner in the same room. The complainant claimed that at some point defendant followed her into her bedroom, shut the door, and ordered her to remove her clothes. As before, defendant allegedly slapped, choked, and threatened the complainant and forced her to submit to oral and vaginal sex over an extended period. The complainant contended that Barbara remained asleep in the living room while the intercourse took place. Afterward, the complainant and defendant dressed, defendant fell asleep in the bed, and the complainant returned to the living room. When defendant awoke, the three of them (defendant, the complainant, and Titto) left to pick up some fast food.

Barbara testified that she awoke in her recliner to find a stranger, Titto, sitting on her couch and then found defendant and the complainant in the bedroom. According to Barbara, she directed defendant to leave

the bedroom, and the complainant left with defendant and Titto to pick up the fast food.

The complainant did not see defendant again until trial. She did not mention the alleged rapes to anyone until months after the second alleged rape, when a counselor conducting a background survey asked her whether anyone had ever sexually assaulted her. The complainant, believing that her response would remain confidential, told the counselor that defendant had sexually assaulted her. The counselor reported the allegations to the police.

At trial, attacking the complainant's credibility became central to the defense's case. Most significantly, Lisa, Barbara, and the complainant's stepfather all averred that the complainant had falsely accused her stepfather of raping her in the past. Furthermore, Lisa characterized the complainant as a compulsive liar, and Barbara indicated that the complainant lied and "just want[ed] to get people in trouble."

The cell phone records at issue in this appeal further call into question the complainant's credibility. At trial, the prosecution elicited unequivocal testimony from the complainant that she never communicated with defendant following their third meeting, at which the second rape allegedly occurred, but she acknowledged that defendant continued to try to communicate with her. On cross-examination, defense counsel confronted the complainant with defendant's cell phone records, which revealed two incoming calls from Barbara's cell phone just days after the third meeting. At that point, the complainant admitted calling defendant once or twice from Barbara's phone. However, when confronted with additional cell phone records revealing what defense counsel described as hundreds of incoming calls following the

third meeting, coming not from Barbara's cell phone, but from the complainant's cell phone, she unequivocally denied contacting defendant after their third meeting when the second alleged rape occurred. According to the complainant, she wanted no further contact with the man who had so brutally violated her.

Defense counsel then attempted to introduce into evidence defendant's cell phone records rebutting the complainant's testimony, but the prosecution objected for lack of a foundation. The trial court sustained the objection. Defense counsel, who had been practicing law for only eight months at the time, made no further effort to have the records admitted.

During closing argument, the prosecution told the jury that it must disregard the cell phone records because they had not been properly admitted into evidence. The prosecution also told the jury to disregard the complainant's testimony in which she acknowledged making some of the calls to defendant because the documents on which the complainant based her testimony had not been properly admitted. The prosecution even suggested the possibility that defendant or defense counsel had fabricated the cell phone records. Finally, the trial court instructed the jury to disregard evidence that had not been properly admitted and that evidence consists only of sworn testimony and exhibits in evidence.

The jury convicted defendant of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 but less than 16 years old), and the trial court sentenced defendant to concurrent terms of 7 to 15 years' imprisonment. In defendant's appeal as of right, appellate counsel moved the Court of Appeals to

remand the case for a *Ginther*[1] hearing on the issue of ineffective assistance of counsel. Attached to the motion was an affidavit by defendant's trial counsel acknowledging that he had intended to introduce the cell phone records but failed to subpoena or otherwise make available the custodian of the records to lay the proper foundation to introduce them into evidence. Defense counsel admitted that his failure to pursue introduction of the records "was not a strategic decision, nor did [he] at any time during trial decide that the phone records were not necessary or beneficial to the defense case." The Court of Appeals denied the motion and subsequently affirmed defendant's convictions and sentences.

The Court of Appeals denied reconsideration, and defendant applied for leave to appeal in this Court. We remanded the case to the trial court with instructions to hold a *Ginther* hearing. Defendant's trial counsel, the only witness called at the hearing, testified that he failed to subpoena the custodian of the cell phone records because of the mistaken belief that the business records exception to the hearsay rule did not require a custodian to testify. Instead, defense counsel thought it would be sufficient to have the complainant acknowledge her phone number on the statement. He admitted that he intended to introduce the records because they were important to the defense's case, but explained that he became flustered following the prosecution's successful objection and therefore made no further attempt to have the records admitted.

The trial court found that the performance of defendant's trial counsel fell below an objective standard of reasonableness. Nonetheless, it found that defendant did not suffer prejudice because he did not demonstrate

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

a reasonable probability that one more attack on the complainant's credibility would have resulted in his acquittal. Accordingly, the trial court upheld defendant's convictions. The Court of Appeals denied leave to appeal, but this Court remanded the case to the Court of Appeals for consideration as on leave granted.[2]

The Court of Appeals affirmed, concluding that, even assuming defense counsel's failure to pursue admission of the records into evidence constituted ineffective assistance, defendant did not suffer prejudice thereby.[3] Defendant then sought leave to appeal in this Court.

II. STANDARD OF REVIEW

Whether a defendant received ineffective assistance of trial counsel presents a mixed question of fact and constitutional law.[4] "A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel."[5] We review the trial court's factual findings for clear error.[6] Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake.[7] We review de novo questions of constitutional law.[8]

III. ANALYSIS

A defendant must meet two requirements to warrant a new trial because of the ineffective assistance of trial

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[2] *People v Armstrong*, 485 Mich 1132 (2010).

[3] *People v Armstrong*, unpublished opinion per curiam of the Court of Appeals, issued January 18, 2011 (Docket No. 291979).

[4] *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004).

[5] *Id*.

[6] *Id*.

[7] *People v Burrell*, 417 Mich 439, 449; 339 NW2d 403 (1983).

[8] *Grant*, 470 Mich at 485.

counsel. First, the defendant must show that counsel's performance fell below an objective standard of reasonableness.[9] In doing so, the defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy.[10] Second, the defendant must show that, but for counsel's deficient performance, a different result would have been reasonably probable.[11]

As a threshold matter, we conclude that defense counsel's performance fell below an objective standard of reasonableness. Failing to pursue the admission of the cell phone records into evidence was not a matter of sound trial strategy. Defense counsel himself testified at the *Ginther* hearing that the records were important and that the only reason he failed to pursue their admission was that he mistakenly believed no additional steps were required for their admission and became flustered when the prosecution successfully objected to their admittance because of the lack of a foundation. At the conclusion of the *Ginther* hearing, the trial court found that failing to pursue the admission did not constitute sound trial strategy, a finding that the prosecution never appealed. We decline to entertain the prosecution's challenge to the trial court's finding at this late stage. Moreover, the prosecution's argument that failing to pursue admission of the records constituted sound trial strategy wholly lacks merit. Admission of the records would have caught the complainant in a lie. Any attorney acting reasonably would have moved for the records' admission, particu-

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[9] *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

[10] *People v Rice (On Remand)*, 235 Mich App 429, 444; 597 NW2d 843 (1999).

[11] *Strickland*, 466 US at 694-696.

larly when, as here, attacking the complainant's credibility offered the most promising defense strategy.

Thus, the critical question is one of prejudice. In answering this question, we hold that the Court of Appeals clearly erred by affirming the trial court's finding of no prejudice. The reasoning in the Court of Appeals' opinion was flawed in several respects.

First, the Court of Appeals concluded that no prejudice resulted from defense counsel's failure to have the cell phone records admitted because the complainant's credibility had been "thoroughly impeached . . . ."[12] This reasoning was clearly erroneous. The defense's whole theory of the case was that the complainant had falsely accused defendant of rape. The attacks on the complainant's credibility at trial were inconclusive, providing mere "he said, she said" testimony contradicting the complainant's version of the events. The other credibility attacks revealed that the complainant had falsely accused her stepfather of rape on a prior occasion and that she habitually lied. Although unquestionably significant, such attacks had less of a tendency to undermine the complainant's credibility than the cell phone records, which would have provided documentary proof strongly suggesting that the complainant lied to *this* jury regarding her actions in connection with the alleged rapes in *this* case.

Further, the prosecution elicited testimony from the complainant that defendant violently raped her and made threats against her life and that she had absolutely no wish to call or speak to defendant after having undergone such a harrowing experience. The cell phone records revealing frequent communication with defendant following the alleged rapes would have cast serious

[12] *Armstrong*, unpub op at 3.

doubt on the substance of her accusations. If defendant violently raped the complainant on two occasions and the complainant felt brutally violated in the way that she described, then one must question why she reached out to defendant through text messages and phone calls when severing all lines of communication would have been a far more appropriate response under the circumstances. Given the telephone records' significance, a reasonable probability exists that this additional attack on the complainant's credibility would have tipped the scales in favor of finding a reasonable doubt about defendant's guilt.

Second, the Court of Appeals clearly erred when it reasoned that, because MCL 750.520d(1)(a) is a strict liability statute under which the complainant's consent was irrelevant, introducing the cell phone records could have resulted in acquittal *only* if they showed the absence of a sexual relationship.[13] Although the issue of consent is indeed irrelevant under MCL 750.520d(1)(a),[14] quite obviously, defense counsel did not seek to admit the records to establish that the alleged intercourse was consensual. Rather, defense counsel sought to establish that the complainant's allegations that intercourse—forcible or otherwise—occurred at all lacked credibility because she falsely testified that she had not called or communicated with defendant after the alleged rapes. We conclude that a reasonable probability exists that the cell phone records would have convinced the jury to discredit the complainant's accusations.

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[13] *Id.*

[14] "[T]here is no issue of consent in a statutory rape charge because a victim below the age of consent is conclusively presumed to be legally incapable of giving his or her consent to sexual intercourse." *People v Cash*, 419 Mich 230, 247-248; 351 NW2d 822 (1984).

Third, the Court of Appeals clearly erred by concluding that the cell phone records could have damaged defendant's case because they might have emphasized the seriousness of defendant's relationship with a 15-year-old girl, casting him in a poor light. This seems to suggest that the Court of Appeals believed that defense counsel chose not to admit the records as a matter of trial strategy. Yet it stated earlier in its opinion that the failure to pursue admission of the records was *not* a matter of trial strategy, revealing inconsistency in its reasoning.[15] The trial court, following a hearing on the matter, found that defense counsel's failure to pursue admission of the records fell below an objective standard of reasonableness and did not constitute sound trial strategy. The prosecution failed to appeal this finding. Further, even assuming that the evidence would have worked slightly against defendant, it does not follow that the evidence would not also have worked so significantly against the complainant as to destroy her credibility and result in defendant's acquittal. Notwithstanding that the cell phone records revealed defendant's frequent communication with a teenage girl, any attorney acting reasonably would have moved for the records' admission given that they offered powerful evidence of the complainant's lying to the jury in a case that essentially boiled down to whether the complainant's allegations of rape were true.

Finally, the Court of Appeals clearly erred when it reasoned that it made no difference whether the jury saw the cell phone records since it heard their contents read into evidence by the complainant. The Court of

[15] "[D]efense counsel's failure to have defendant's phone bill admitted into evidence was based on an erroneous belief that the complainant's testimony alone could lay the foundation for admission of the records and not sound trial strategy . . . ." *Armstrong*, unpub op at 2.

Appeals seemed to ignore that the complainant acknowledged only a fraction of the numerous communications revealed in the cell phone records. Further, according to the trial court's instruction, the jury was to disregard the cell phone records because they had not been properly admitted. We presume that a jury follows its instructions.[16] Moreover, even assuming that the jury considered the portion of the cell phone records read into evidence, the jury also heard from the prosecution that defendant or defense counsel might have fabricated the records. We disagree with the Court of Appeals that instructing the jury that the attorneys' statements and arguments are not evidence cured such a significant and damning accusation.

IV. CONCLUSION

For the foregoing reasons, we hold that the failure of defendant's trial counsel to pursue the introduction of the cell phone records into evidence not only fell below an objective standard of reasonableness, but also prejudiced defendant. Accordingly, we reverse the judgment of the Court of Appeals and remand the case to the Otsego Circuit Court for a new trial.

YOUNG, C.J., and CAVANAGH, MARILYN KELLY, MARKMAN, HATHAWAY, and MARY BETH KELLY, JJ., concurred with ZAHRA, J.

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[16] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

In re REQUEST FOR ADVISORY OPINION REGARDING CONSTITUTIONALITY OF 2011 PA 38

Docket No. 143157. Argued September 7, 2011 (Calendar No. 1). Decided November 18, 2011.

The Governor, pursuant to Const 1963, art 3, § 8, requested the opinion of the Supreme Court regarding the constitutionality of amendments of § 30 of the Income Tax Act, MCL 206.30, by 2011 PA 38 that reduce or eliminate the statutory tax exemption for public-pension incomes and base eligibility for income-tax exemptions and deductions on total household resources or age and total household resources. The Supreme Court granted the request and asked the Attorney General to submit separate briefs arguing both for and against the constitutionality of the amendments. 489 Mich 954 (2011).

In an opinion by Justice MARKMAN, joined by Chief Justice YOUNG and Justices MARY BETH KELLY and ZAHRA, the Supreme Court *held*:

Reducing or eliminating the statutory exemption for public-pension incomes as set forth in MCL 206.30 did not violate Const 1963, art 9, § 24; Const 1963, art 1, § 10; or US Const, art I, § 10(1). Determining eligibility for income-tax exemptions on the basis of date of birth as set forth in MCL 206.30(9) did not violate the equal protection of the law under Const 1963, art 1, § 2 or the Fourteenth Amendment of the United States Constitution. Determining eligibility for income-tax exemptions and deductions on the basis of total household resources as set forth in MCL 206.30(7) and (9) created a graduated income tax in violation of Const 1963, art 9, § 7. Those provisions are severable from the remainder of the act, which is constitutional with respect to all the issues raised.

1. Reducing or eliminating the statutory exemption for public-pension incomes as set forth in MCL 206.30 did not violate Const 1963, art 9, § 24, which provides that the accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions is a contractual obligation of the state or political subdivision that it shall not diminish or impair. Const 1963, art 9, § 24 provides that public pensions must be treated as contractual obligations that, once earned, cannot be diminished;

however, it says nothing about whether these pension benefits can be taxed. Given the broad authority to tax that Const 1963, art 9, § 1 grants the Legislature and the specific constitutional prohibition in Const 1963, art 9, § 2 against surrendering, suspending, or contracting away this authority, a limitation on the Legislature's authority to tax pensions cannot reasonably be read into Const 1963, art 9, § 24. Furthermore, a tax exemption is not an accrued financial benefit of a pension plan because, unlike the pension payments that are the subject of article 9, § 24, tax exemptions do not increase or grow over time and cannot be funded in the year that the service was rendered.

2. Reducing or eliminating the statutory exemption for public-pension incomes as set forth in MCL 206.30 did not violate Const 1963, art 1, § 10 or US Const, art I, § 10(1), which prohibit laws that impair contractual obligations. Although Const 1963, art 9, § 24 provides that an accrued public pension is a contractual obligation, this obligation consists of the pension income itself, not the tax exemption for that income. Furthermore, there is a strong presumption that taxation statutes in particular do not create contractual rights unless there is express statutory language to that effect that is plain and susceptible of no other reasonable construction. Because there is no such language in any of the statutory tax-exemption provisions at issue, and because Const 1963, art 9, § 2 prohibits the Legislature from contracting away its taxing authority, the tax-exemption statutes do not create contractual rights that the Legislature cannot alter.

3. Determining eligibility for income-tax exemptions on the basis of date of birth as set forth in MCL 206.30(9) did not violate the equal protection of the law under Const 1963, art 1, § 2 or the Fourteenth Amendment of the United States Constitution. The fact that older taxpayers have relied more on an exemption, will have less time in which to earn additional income to offset the loss of the exemption, and may have diminishing earning capacity provides a rational basis for grounding eligibility for the pension exemption on date of birth.

4. Determining eligibility for income-tax exemptions and deductions on the basis of total household resources as set forth in MCL 206.30(7) and (9), violated Const 1963, art 9, § 7, which provides that no income tax graduated as to rate or base shall be imposed by the state or any of its subdivisions. A taxpayer's base consists of his or her net taxable income, and exemptions and deductions reduce this base by reducing the amount of income that is subject to taxation. MCL 206.30(7) and (9) create a graduated system by conditioning the receipt of all or a portion of income-tax

deductions or exemptions for some taxpayers on their level of income. This results in an income tax that is graduated as to base in violation of Const 1963, art 9, § 7 because taxpayers who do not receive the deductions and exemptions will have disproportionately larger bases.

5. The unconstitutional portions of MCL 206.30(7) and (9) could reasonably be severed pursuant to MCL 8.5 because what remained could "be given effect" and was clearly in furtherance of the Legislature's stated goal of addressing deficiencies in state funds.

2011 PA 38 held constitutional but for those portions that determine eligibility for income-tax exemptions and deductions on the basis of total household resources; unconstitutional portions severed.

Justice CAVANAGH, joined by Justice MARILYN KELLY, concurring in part and dissenting in part, concurred in result only with part III(C) of the majority opinion, which held that the amendments of 2011 PA 38 did not violate constitutional equal protection guarantees, and with part III(D), which held that the amendments violated the prohibition against a graduated income tax. Justice CAVANAGH dissented from part III(A) of the majority opinion and would have held instead that the amendments of 2011 PA 38 violated Const 1963, art 9, § 24 with respect to those pension benefits that will have accrued before January 1, 2012, when 2011 PA 38 goes into effect. He would have held that the right to the statutory tax exemptions before that date was an accrued financial benefit on which public employees had worked in reliance, that it attached to the pension benefits at the time they accrued—that is, when the benefits were earned—and that the right to the deferred exemptions was therefore a contractual obligation under article 9, § 24 that may not be diminished or impaired.

Justice HATHAWAY, dissenting, would have held that reducing or eliminating the statutory deduction for public-pension income impairs accrued financial benefits in violation of Const 1963, art 9, § 24 by effectively imposing a new tax on public-employee pensions that diminishes or reduces vested public-employee pension benefits. Justice HATHAWAY would also have held that reducing or eliminating the statutory deduction for pensions resulted in a law impairing contractual obligations under Const 1963, art 1, § 10 because article 9, § 24 creates an undiminishable, unimpairable contractual obligation with regard to accrued financial benefits of retirement income. Justice HATHAWAY agreed that the income-based criteria for determining tax liability created a graduated income tax, but disagreed with

the majority's decision to sever those portions of the statute rather than striking down MCL 206.30(7) and (9) in their entirety because doing so created tax exemptions and deductions that the Legislature did not intend.

1. CONSTITUTIONAL LAW — TAXATION — EXEMPTIONS FROM TAXES — PUBLIC PENSIONS AND RETIREMENT SYSTEMS — ACCRUED FINANCIAL BENEFITS — DIMINISHMENT OR IMPAIRMENT.

Reducing or eliminating the statutory tax exemption for public-pension incomes does not violate the constitutional provision that prohibits the state and its political subdivisions from diminishing or impairing the accrued financial benefits of their pension plans and retirement systems (Const 1963, art 9, § 24; MCL 206.30; 2011 PA 38).

2. CONSTITUTIONAL LAW — TAXATION — TAX EXEMPTIONS — PUBLIC PENSIONS AND RETIREMENT SYSTEMS — CONTRACTS — IMPAIRMENT OF CONTRACTUAL OBLIGATIONS.

Reducing or eliminating the statutory tax exemption for public-pension incomes does not violate the constitutional prohibition of laws that impair contractual obligations (US Const, art I, § 10[1]; Const 1963, art 1, § 10; MCL 206.30; 2011 PA 38).

3. CONSTITUTIONAL LAW — TAXATION — EQUAL PROTECTION — TAX EXEMPTIONS — ELIGIBILITY — AGE.

Determining eligibility for income-tax exemptions on the basis of a taxpayer's date of birth does not violate the equal protection of the law (US Const, Am XIV; Const 1963, art 1, § 2; MCL 206.30[9]; 2011 PA 38).

4. CONSTITUTIONAL LAW — TAXATION — GRADUATED TAXATION — TAX EXEMPTIONS AND DEDUCTIONS — ELIGIBILITY — TOTAL HOUSEHOLD RESOURCES.

Determining eligibility for income-tax exemptions and deductions on the basis of a taxpayer's total household resources or age and total household resources violates the constitutional prohibition of imposing an income tax that is graduated as to rate or base (Const 1963, art 9, § 7; MCL 206.30[7], 206.30[9]; 2011 PA 38).

Bill Schuette, Attorney General, *John J. Bursch*, Solicitor General, *Richard A. Bandstra*, Chief Legal Counsel, and *Bradley K. Morton*, Assistant Attorney General, for the Attorney General in support of the constitutionality of the amendments of 2011 PA 38.

Bill Schuette, Attorney General, *B. Eric Restuccia*, Deputy Solicitor General, and *Frank Monticello*, *Ann Sherman*, *Heidi Johnson-Mehney*, *Heather Meingast*, and *Amy Patterson*, Assistant Attorneys General, for the Attorney General in opposition to the constitutionality of the amendments of 2011 PA 38.

Amici Curiae:

D. Daniel McLellan and *Stuart R. Cohen* for the Michigan State Employee Retirees Association Coordinating Council, the Michigan Federation of Chapters of National Active and Retired Federal Employees Association, and AARP.

Dickinson Wright PLLC (by *Peter H. Ellsworth*, *Jeffery V. Stuckey*, and *Peter J. Kulick*) for the Michigan Bankers Association, the Michigan Chamber of Commerce, and the Michigan Retailers Association.

Honigman Miller Schwartz & Cohn LLP (*John D. Pirich* and *Andrea L. Hansen*) for Business Leaders for Michigan and the Small Business Association of Michigan.

Michael F. Saggau for International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW).

White, Schneider, Young & Chiodini, P.C. (by *James J. Chiodini* and *Timothy J. Dlugos*), for the Michigan Education Association.

Sachs Waldman, P.C. (by *Mary Ellen Gurewitz*), for Michigan State AFL-CIO and Service Employees International Union, Local 517M.

MARKMAN, J. Pursuant to Const 1963, art 3, § 8, this Court granted the Governor's request for an advisory

opinion on the constitutionality of 2011 PA 38.[1] More specifically, we granted the Governor's request to address the following four constitutional questions:

> (1) whether reducing or eliminating the statutory exemption for public-pension incomes as described in MCL 206.30, as amended, impairs accrued financial benefits of a "pension plan [or] retirement system of the state [or] its political subdivisions" under Const 1963, art 9, § 24; (2) whether reducing or eliminating the statutory tax exemption for pension incomes, as described in MCL 206.30, as amended, impairs a contract obligation in violation of Const 1963, art 1, § 10 or US Const, art I, § 10(1); (3) whether determining eligibility for income-tax exemptions on the basis of total household resources, or age and total household resources, as described in MCL 206.30(7) and (9), as amended, creates a graduated income tax in violation of Const 1963, art 9, § 7; and (4) whether determining eligibility for income-tax exemptions on the basis of date of birth, as described in MCL 206.30(9), as amended, violates equal protection of the law under Const 1963, art 1, § 2 or the Fourteenth Amendment of the United States Constitution. [*In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 489 Mich 954 (2011).]

We answer all these questions, with the exception of whether 2011 PA 38 creates a graduated income tax, in the negative. That is, we hold that:

- Reducing or eliminating the statutory exemption for public-pension incomes as set forth in MCL 206.30[2] *does not* impair accrued financial benefits of a "pension plan [or] retirement system of the state [or] its political subdivisions" under Const 1963, art 9, § 24; and

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[1] Const 1963, art 3, § 8 provides, "Either house of the legislature or the governor may request the opinion of the supreme court on important questions of law upon solemn occasions as to the constitutionality of legislation after it has been enacted into law but before its effective date."

[2] Unless otherwise specified, all references to MCL 206.30 are to that provision as amended by 2011 PA 38.

• Reducing or eliminating the statutory tax exemption for pension incomes as set forth in MCL 206.30 *does not* impair a contractual obligation in violation of Const 1963, art 1, § 10 or US Const, art I, § 10(1).

And we hold unanimously that:

• Determining eligibility for income-tax exemptions on the basis of date of birth as set forth in MCL 206.30(9) *does not* violate the equal protection of the law under Const 1963, art 1, § 2 or the Fourteenth Amendment of the United States Constitution; and

• Determining eligibility for income-tax exemptions and deductions on the basis of total household resources as set forth in MCL 206.30(7) and (9) *does* create a graduated income tax in violation of Const 1963, art 9, § 7.

Finally, we hold that:

• Pursuant to MCL 8.5, the unconstitutional portions of 2011 PA 38 can reasonably be severed from the remainder of the act, which is constitutional with respect to all the issues raised.

Although Justice HATHAWAY agrees that those portions of the statutes that we sever ought to be struck down because they are unconstitutional, she nevertheless asserts that we are "judicially creating tax deductions and exemptions for individuals earning more than $75,000 annually . . . ." *Post* at 363. This is an odd assertion, given that she too would "create tax deductions and exemptions for individuals earning more than $75,000" by striking down the amendments of these provisions in their entirety and thereby returning the law to its pre-2011 PA 38 status, in which taxpayers earning more than $75,000 received these same deductions and exemptions.

We emphasize that the questions before us are all constitutional questions. This Court is not deciding whether 2011 PA 38 represents wise or unwise, prudent or imprudent public policy, only whether 2011 PA 38 is consistent with the constitutions of the United States and Michigan.

I. BACKGROUND

On May 25, 2011, the Governor signed into law Enrolled House Bill 4361, which became 2011 PA 38. The particular provisions at issue here are MCL 206.30(7) and MCL 206.30(9) of the Income Tax Act,[3] which will take effect January 1, 2012. MCL 206.30(7) provides in pertinent part:

> For a taxpayer whose total household resources[4] are $75,000.00 or more for a single return or $150,000.00 or more for a joint return, the personal exemption allowed under [MCL 206.30(2)][5] shall be adjusted by multiplying the exemption for the tax year for a single return by a fraction, the numerator of which is $100,000.00 minus the taxpayer's total household resources, and the denominator of which is $25,000.00, and for a joint return by a fraction, the numerator of which is $200,000.00 minus the taxpayer's total household resources, and the denominator of which is

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[3] MCL 206.1 *et seq*.

[4] Under 2011 PA 38, the term "total household resources" is defined as

> all income received by all persons of a household in a tax year while members of a household, plus any net business loss after netting all business income and loss, plus any net rental or royalty loss, plus any deduction from federal adjusted gross income for a carryback or carryforward of a net operating loss as defined in [26 USC 172(b)(2)]. [MCL 206.508(4).]

[5] MCL 206.30(2) provides, "Except as otherwise provided in [MCL 206.30(7)], a personal exemption of $3,700.00 multiplied by the number of personal or dependency exemptions allowable on the taxpayer's federal income tax return pursuant to the internal revenue code shall be subtracted in the calculation that determines taxable income."

> $50,000.00. The personal exemption allowed under [MCL 206.30(2)] shall not be allowed for a single taxpayer whose total household resources exceed $100,000.00 or for joint filers whose total household resources exceed $200,000.00.

MCL 206.30(9) provides:

> In determining taxable income under this section, the following limitations and restrictions apply:
>
> (a) For a person born before 1946, this subsection provides no additional restrictions or limitations under [MCL 206.30(1)(f)].
>
> (b) For a person born in 1946 through 1952, the sum of the deductions under [MCL 206.30(1)(f)(*i*), (*ii*), and (*iv*)][6]

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[6] MCL 206.30(1)(f) provides, in pertinent part:

> Deduct the following to the extent included in adjusted gross income subject to the limitations and restrictions set forth in [MCL 206.30(9)]:
>
> (*i*) Retirement or pension benefits received from a federal public retirement system or from a public retirement system of or created by this state or a political subdivision of this state.
>
> (*ii*) Retirement or pension benefits received from a public retirement system of or created by another state or any of its political subdivisions if the income tax laws of the other state permit a similar deduction or exemption or a reciprocal deduction or exemption of a retirement or pension benefit received from a public retirement system of or created by this state or any of the political subdivisions of this state.
>
> * * *
>
> (*iv*) Beginning on and after January 1, 2007, retirement or pension benefits not deductible under [MCL 206.30(1)(f)(*i*)] or [MCL 206.30(1)(e)] from any other retirement or pension system or benefits from a retirement annuity policy in which payments are made for life to a senior citizen, to a maximum of $42,240.00 for a single return and $84,480.00 for a joint return. The maximum amounts allowed under this subparagraph shall be reduced by the amount of the deduction for retirement or pension benefits claimed under [MCL 206.30(1)(f)(*i*)] or [MCL 206.30(1)(e)] and by the amount of a deduction claimed under [MCL 206.30(1)(p)]. For the 2008 tax year and each tax year after 2008, the maximum amounts allowed under this

is limited to $20,000.00 for a single return and $40,000.00 for a joint return. After that person reaches the age of 67, the deductions under [MCL 206.30(1)(f)(*i*), (*ii*), and (*iv*)] do not apply and that person is eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return, which deduction is available against all types of income and is not restricted to income from retirement or pension benefits. However if that person's total household resources exceed $75,000.00 for a single return or $150,000.00 for a joint return, that person is not eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return. A person that takes the deduction under [MCL 206.30(1)(e)][7] is not eligible for the unrestricted deduction of $20,000.00 for a single return and $40,000.00 for a joint return under this subdivision.

(c) For a person born after 1952, the deduction under [MCL 206.30(1)(f)(*i*), (*ii*), or (*iv*)] does not apply. When that person reaches the age of 67, that person is eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return, which deduction is available against all types of income and is not restricted to income from retirement or pension benefits. If a person takes the deduction of $20,000.00 for a single return and $40,000.00 for a joint return, that person shall not take the deduction under [MCL 206.30(1)(f)(*iii*)][8] and shall not take the personal exemp-

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subparagraph shall be adjusted by the percentage increase in the United States consumer price index for the immediately preceding calendar year. The department shall annualize the amounts provided in this subparagraph as necessary. As used in this subparagraph, "senior citizen" means that term as defined in [MCL 206.514].

[7] MCL 206.30(1)(e) provides:

> Deduct, to the extent included in adjusted gross income, the following:
>
> (*i*) Compensation, including retirement benefits, received for services in the armed forces of the United States.
>
> (*ii*) Retirement or pension benefits under the railroad retirement act of 1974, 45 USC 231 to 231v.

[8] MCL 206.30(1)(f)(*iii*) allows a deduction for "[s]ocial security benefits as defined in [26 USC 86]."

> tion under [MCL 206.30(2)]. That person may elect not to take the deduction of $20,000.00 for a single return and $40,000.00 for a joint return and elect to take the deduction under [MCL 206.30(1)(f)(*iii*)] and the personal exemption under [MCL 206.30(2)] if that election would reduce that person's tax liability. However, if that person's total household resources exceed $75,000.00 for a single return or $150,000.00 for a joint return, that person is not eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return. A person that takes the deduction under [MCL 206.30(1)(e)] is not eligible for the unrestricted deduction of $20,000.00 for a single return and $40,000.00 for a joint return under this subdivision.
>
> (d) For a joint return, the limitations and restrictions in this subsection shall be applied based on the age of the older spouse filing the joint return.

Before the enactment of 2011 PA 38, public-pension benefits were completely deductible,[9] private-pension benefits were deductible up to $42,240 for a single

[9] All public-pension benefits were completely deductible under the Income Tax Act. In addition, the State Employees' Retirement Act, MCL 38.40, the Public School Employees Retirement Act, MCL 38.1346(1), the Michigan Legislative Retirement System Act, MCL 38.1057(1), the city library employees' retirement system act, MCL 38.705, and the Judges Retirement Act, MCL 38.2670(1), exempted certain public-pension benefits from taxation. All these acts were amended to remove the statutory exemption from state taxes consistently with 2011 PA 38. See 2011 PA 41, 2011 PA 42, 2011 PA 43, 2011 PA 44, and 2011 PA 45. Although the Governor's request and our order in this case referred explicitly only to 2011 PA 38, because Public Acts 41 through 45 of 2011 are inextricably linked to the issues raised in this case, we make clear that we have considered these statutory amendments when reviewing the issues in this case, and our holding takes into account whatever effect each of these provisions may have on the issues raised. Citing this footnote, Justice CAVANAGH asserts that this opinion "sweeps far too wide in attempting to foreclose the myriad possible challenges premised on individual factual circumstances." *Post* at 360. However, we refer to these other provisions only because they are relevant to the question before us: whether reducing or eliminating the statutory tax exemption for public-pension incomes impairs the accrued financial benefits of a public-pension plan.

return and $84,480 for a joint return (subject to annual inflation adjustments), and all taxpayers were entitled to a personal exemption of $2,500 (subject to annual inflation adjustments). See MCL 206.30(1)(f), (2), and (7), as amended by 2009 PA 134. Pursuant to 2011 PA 38, however, not all public pensions are deductible, not all private pensions are deductible up to $42,240 or $84,480, and not all taxpayers are entitled to a personal exemption. MCL 206.30(7) and (9). Instead, only those taxpayers whose total household resources are less than $75,000 for a single return or $150,000 for a joint return are entitled to the entire personal exemption (which is now $3,700),[10] while those taxpayers whose total household resources are between $75,000 and $100,000 for a single return or $150,000 and $200,000 for a joint return are entitled to a portion of this personal exemption, and those taxpayers whose total household resources exceed $100,000 for a single return or $200,000 for a joint return are not entitled to any portion of the personal exemption. MCL 206.30(7).

In addition, while 2011 PA 38 does not affect the available pension deductions of those people born before 1946, it does affect the pension deductions of those people born in 1946 and thereafter. MCL 206.30(9). For those people born on or after January 1, 1946 and not after December 31, 1952, public and private pensions are subject to the same deductions up to $20,000 for a single return and $40,000 for a joint return. MCL 206.30(9)(b). And, upon reaching the age of 67, although the pension deductions are no longer available, a general deduction[11] is available for those people up to

[10] MCL 206.30(2).

[11] A general deduction is a deduction that is "available against all types of income and is not restricted to income from retirement or pension benefits." MCL 206.30(9)(b).

$20,000 for a single return and $40,000 for a joint return as long as the taxpayer's total household resources do not exceed $75,000 for a single return or $150,000 for a joint return. *Id.* Finally, for those people born after December 31, 1952, although the pension deductions are no longer available, upon reaching the age of 67, a general deduction is available up to $20,000 for a single return and $40,000 for a joint return as long as the taxpayer's total household resources do not exceed $75,000 for a single return or $150,000 for a joint return. MCL 206.30(9)(c). However, if a taxpayer takes the general deduction, he or she cannot take the deduction for social security benefits or the personal exemption. *Id.*

The Governor, in a letter dated May 31, 2011, requested an advisory opinion regarding the constitutionality of 2011 PA 38. On June 15, 2011, we granted this request, invited the Attorney General to submit briefs and argue as both opponent and proponent of the matters at issue, invited other interested parties to file briefs amicus curiae, and, on September 7, 2011, heard oral arguments.[12]

II. STANDARDS

"Statutes are presumed to be constitutional, and courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *Taylor v Gate Pharm*, 468 Mich 1, 6; 658 NW2d 127 (2003). "We exercise the power to declare a law unconstitutional with extreme caution, and we never

[12] To avoid confusion, the terms "supporting Attorney General" and "opposing Attorney General" will be used throughout this opinion to identify the briefs and argument submitted by the Attorney General as the proponent and opponent, respectively, of the constitutionality of 2011 PA 38.

exercise it where serious doubt exists with regard to the conflict." *Phillips v Mirac, Inc*, 470 Mich 415, 422; 685 NW2d 174 (2004). " 'Every reasonable presumption or intendment must be indulged in favor of the validity of an act, and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity.' " *Id.* at 423, quoting *Cady v Detroit*, 289 Mich 499, 505; 286 NW 805 (1939). Therefore, "the burden of proving that a statute is unconstitutional rests with the party challenging it," *In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71*, 479 Mich 1, 11; 740 NW2d 444 (2007), in this case the opposing Attorney General. "[W]hen considering a claim that a statute is unconstitutional, the Court does not inquire into the wisdom of the legislation." *Taylor*, 468 Mich at 6.

"The presumption of constitutionality is especially strong with respect to taxing statutes." *Caterpillar, Inc v Dep't of Treasury*, 440 Mich 400, 413; 488 NW2d 182 (1992). "State legislatures have great discretionary latitude in formulating taxes." *Id.* " 'The legislature must determine all questions of State necessity, discretion or policy in ordering a tax and in apportioning it. 1 Cooley, Taxation (4th ed), § 67. And the judicial tribunals of the State have no concern with the policy of State taxation determined by the legislature. 1 Cooley, Taxation (4th ed), § 67.' " *Id.* at 414, quoting *C F Smith Co v Fitzgerald*, 270 Mich 659, 670; 259 NW 352 (1935). Therefore, "[a] taxing statute must be shown to clearly and palpably violate[] the fundamental law before it will be declared unconstitutional." *Caterpillar*, 440 Mich at 415, quoting *O'Reilly v Wayne Co*, 116 Mich App 582, 592; 323 NW2d 493 (1982) (citations and quotation marks omitted; alteration in *O'Reilly*).

" 'When reviewing constitutional provisions, the objective of such review is to effectuate the intent of the people who adopted the constitution.' " *Straus v Governor*, 459 Mich 526, 533; 592 NW2d 53 (1999), quoting *Straus v Governor*, 230 Mich App 222, 228; 583 NW2d 520 (1998). " 'The lodestar principle is that of "common understanding," the sense of the words used that would have been most obvious to those who voted to adopt the constitution.' " *Id.* " 'Both sides have cited portions of the "Address to the People" and the record of the Constitutional Convention, both of which may properly be considered in interpreting constitutional provisions.' " *Straus*, 495 Mich at 533, quoting *Straus*, 230 Mich App at 228 n 2.[13] However, it must be remembered that

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[13] While on more than one occasion this Court has explained why it does not find all forms of legislative history to be useful tools in the interpretative process, see, e.g., *In re Certified Question from the United States Court of Appeals for the Sixth Circuit*, 468 Mich 109, 115 n 5; 659 NW2d 597 (2003), this Court has consistently held that the Address to the People and the constitutional convention debates may be highly relevant in determining the meaning of particular constitutional provisions to the *ratifiers*, see, e.g., *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 655-656; 698 NW2d 350 (2005). The Address is particularly important in this regard because it represents what the ratifiers, the people, were told about the proposed constitution *before* they voted to adopt it. See *People v Nutt*, 469 Mich 565, 590 n 26; 677 NW2d 1 (2004) ("The Address to the People, widely distributed to the public prior to the ratification vote in order to explain the import of the . . . proposals, 'is a valuable tool . . . .' ") (citation omitted). Moreover, unlike other forms of legislative history, such as "legislative analyses" created within the legislative branch by staff persons, the Address was "officially approved by the members of the constitutional convention . . . ." *Mich United Conservation Clubs v Secretary of State (After Remand)*, 464 Mich 359, 378; 630 NW2d 297 (2001) (YOUNG, J., concurring). Finally, the Address represents the best statement of the convention as a *whole*, as a collective body, rather than merely the statements of individual convention delegates. Nonetheless, we believe that even the latter has greater value in supplying evidence of the intended meaning of constitutional provisions, which of necessity tend to be broad and general

> although this Court has continually recognized that constitutional convention debates are relevant to determining the meaning of a particular provision, . . . the proper objective in consulting constitutional convention debates is not to discern the intent of the framers in proposing or supporting a specific provision, but to determine the intent of the ratifiers in adopting the provision . . . .
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> * * *
>
> Bearing this principle in mind, the primary focus . . . should not [be] on the intentions of the delegates . . . but, rather, on any statements they may have made that would have shed light on why they chose to employ the particular terms they used in drafting the provision to aid in discerning what the common understanding of those terms would have been when the provision was ratified by the *people*. [*Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 655-657; 698 NW2d 350 (2005) (citations omitted; emphasis added).]

III. ANALYSIS

A. ACCRUED FINANCIAL BENEFIT

The first issue contained in the Governor's request for an advisory opinion concerns whether reducing or eliminating the statutory exemption for public-pension incomes as set forth in MCL 206.30 impairs accrued financial benefits of a "pension plan [or] retirement system of the state [or] its political subdivisions" under Const 1963, art 9, § 24. The first clause of Const 1963, art 9, § 24 provides, "The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or

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expressions of policy, than do the statements of individual legislators with regard to statutes, which tend to be more specific and limited expressions of policy.

impaired thereby." Before § 24 was adopted, "[i]t had long been the general rule that pensions granted by public authorities were not contractual obligations but gratuitous allowances which could be revoked at will by the authority because the pensioner was not deemed to have had any vested right in their continuation." *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659, 662; 209 NW2d 200 (1973).[14] The obvious intent of § 24, however, was to ensure that public pensions be treated as contractual obligations that, once earned, could not be diminished. As explained by Delegate Richard Van Dusen, who served on the Finance and Taxation Committee and was the chairman of the Rules and Resolutions Committee, at the Constitutional Convention of 1961-1962,

> [§ 24] is designed to . . . give to the employees participating in these plans a security which they do not now enjoy, by making the accrued financial benefits of the plans contractual rights. This, you might think, would go without saying, but several judicial determinations have been made to the effect that participants in pension plans for public employees have no vested interest in the benefits which they believe they have earned; that the municipalities and the state authorities which provide these plans provide them as a gratuity, and therefore it is within the province of the municipality or the other public employer to terminate the plan at will without regard to the benefits which have been, in the judgment of the employees, earned.
>
> Now, it is the belief of the committee that the benefits of pension plans are in a sense deferred compensation for work performed. And with respect to work performed, it is

[14] See, e.g., *Brown v Highland Park*, 320 Mich 108, 114; 30 NW2d 798 (1948) ("We are convinced that the majority of cases in other jurisdictions establishes the rule that a pension granted by public authorities is not a contractual obligation, that the pensioner has no vested right, and that a pension is terminable at the will of a municipality, at least while acting within reasonable limits.").

> the opinion of the committee that the public employee should have a contractual right to benefits of the pension plan, which should not be diminished by the employing unit after the service has been performed. [1 Official Record, Constitutional Convention 1961, pp 770-771, quoted with approval in *Advisory Opinion*, 389 Mich at 663.]

Const 1963, art 9, § 24, however, says nothing about whether these pension benefits can be taxed. And given the broad authority to tax granted to the Legislature by Const 1963, art 9, § 1[15] and the specific constitutional prohibition against "surrender[ing], suspend[ing] or contract[ing] away" this authority, Const 1963, art 9, § 2,[16] a limitation on the Legislature's authority to tax pensions cannot reasonably be read into Const 1963, art

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[15] Const 1963, art 9, § 1 provides, "The legislature shall impose taxes sufficient with other resources to pay the expenses of state government." See also *Civil Serv Comm v Auditor General*, 302 Mich 673, 682-683; 5 NW2d 536 (1942), in which this Court explained:

> [T]he control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the legislature, and not to be surrendered or abridged, save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people. The right of the legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means both of their collection and disbursement, is firmly and inexpugnably established in our political system. This supreme prerogative of the legislature, called in question by Charles I, was the issue upon which Parliament went to war with the king, with the result that ultimately the absolute control of Parliament over the public treasury was forever vindicated as a fundamental principle of the British Constitution. The American commonwealths have fallen heirs to this great principle, and the prerogative in question passes to their legislatures without restriction or diminution, except as provided by their Constitutions, by the simple grant of the legislative power. [Citations and quotation marks omitted.]

[16] Const 1963, art 9, § 2 provides, "The power of taxation shall never be surrendered, suspended or contracted away."

9, § 24. If the ratifiers of the Constitution had intended to limit the Legislature's authority to tax pensions in the same manner as all other forms of income, they would have expressly said so in § 24. See *Shivel v Kent Co Treasurer*, 295 Mich 10, 15; 294 NW 78 (1940) ("The power to levy taxes for governmental needs is in the legislature subject only to limitations and regulations found in the Constitution."). That the ratifiers knew how to do so had they so intended is clearly evidenced by the fact that they did, in fact, expressly limit the Legislature's authority to tax nonprofit religious or educational organizations in Const 1963, art 9, § 4[17] and the sale of prescription drugs and food in Const 1963, art 9, § 8.[18]

Again, Const 1963, art 9, § 24 provides that "[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." A tax exemption is not an "accrued financial benefit" of a pension plan. "Accrue" means " 'to increase, grow,' " " 'to come into existence as an enforceable claim,' " to " 'vest as a right,' " " 'to come by way of increase or addition: arise as a growth or result,' " " 'to be periodically accumulated in the process of time,' " to " 'gather, collect, accumulate,' " " 'to happen or result as a natu-

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[17] Const 1963, art 9, § 4 provides, "Property owned and occupied by non-profit religious or educational organizations and used exclusively for religious or educational purposes, as defined by law, shall be exempt from real and personal property taxes."

[18] Const 1963, art 9, § 8 provides, in pertinent part:

> No sales tax or use tax shall be charged or collected from and after January 1, 1975 on the sale or use of prescription drugs for human use, or on the sale or use of food for human consumption except in the case of prepared food intended for immediate consumption as defined by law.

ral growth,' " to " 'arise in due course,' " to " 'come or fall as an addition or increment,' " and "to become a present and enforceable right or demand." *Studier*, 472 Mich at 653, quoting *Webster's Third New Int'l Dictionary* (1961), p 13 and *Random House American College Dictionary* (1964), p 9. See also *Random House Webster's College Dictionary* (1991) (defining "accrue" as "to happen or result as a natural growth, addition," "to be added as a matter of periodic gain or advantage, as interest on money," and "to accumulate or earn over time").[19]

> Thus, according to these definitions, the ratifiers of our Constitution would have commonly understood "accrued" benefits to be benefits of the type that increase or grow over time—such as a pension payment or retirement allowance that increases in amount along with the number of years of service a public school employee has completed.[20] [*Studier*, 472 Mich at 654.][21]

A pension-tax exemption is not an "accrued" benefit

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[19] Justice CAVANAGH "do[es] not see how these definitions mandate that the benefit must 'increase or grow over time.' " *Post* at 355. Once again, these definitions of "accrue" include " 'to increase, grow,' " " 'arise as a growth or result,' " " 'to be periodically accumulated in the process of time,' " to " 'gather, collect, accumulate,' " " 'to happen or result as a natural growth,' " to " 'arise in due course,' " to " 'come or fall as an addition or increment,' " *Studier*, 472 Mich at 653, quoting *Webster's Third New Int'l Dictionary* (1961), p 13, and *Random House American College Dictionary* (1964), p 9, "to be added as a matter of periodic gain or advantage, as interest on money," and "to accumulate or earn over time," *Random House Webster's College Dictionary* (1991). Given these definitions, we do not see how *Studier*'s holding that an accrued benefit is a benefit that "increase[s] or grow[s] over time" can be seriously contested.

[20] See also *Kosa v State Treasurer*, 408 Mich 356, 370-371; 292 NW2d 452 (1980) ("The term 'accrued financial benefits' was defined by this Court in *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659, 662-663; 209 NW2d 200 [1973], as the right to receive certain pension payments upon retirement, based upon service performed.").

[21] In *Studier*, this Court held that health-care benefits are not "accrued financial benefits" because they do not "grow over time." *Studier*, 472 Mich at 654.

because it does not "grow over time." During a state employee's working years, his or her pension-tax exemption, as opposed to the pension itself, cannot be said to be growing or accumulating because it does not even "come into existence" or "vest" until after the employee has retired and begins to collect his or her pension benefits. That is, one does not have a right to a tax exemption until one has received the funds that are subject to the exemption. Absent those funds, there is no tax exemption. And once a retiree has begun to receive his or her pension benefits, the tax exemption itself still does not "grow over time," but remains fixed. Therefore, a tax exemption is not an "accrued financial benefit."[22]

The second clause of Const 1963, art 9, § 24 states, "Financial benefits arising on account of service rendered in each fiscal year shall be funded during that year and such funding shall not be used for financing unfunded accrued liabilities." This clause confirms that a tax exemption is not an "accrued financial benefit" protected by § 24 because it would be impossible to fund a tax exemption, as opposed once again to the pension itself, in the year that the service was rendered in light of the fact that an exemption's value is entirely a function of the tax rate of the taxpayer at the time that the exemption is actually taken—something that obviously cannot be known at the time the services themselves are rendered.[23]

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[22] In concluding that the "tax exemption *does* 'increase or grow over time,' " *post* at 357 (emphasis in the original), Justice CAVANAGH fails to recognize that this exemption does not even come into being until the employee retires and begins to collect his or her pension benefits.

[23] Justice CAVANAGH inconsistently argues that a tax exemption *does* constitute an "accrued financial benefit" for purposes of the first clause of article 9, § 24 and therefore cannot be impaired, but that a tax exemption does *not* constitute a "financial benefit" for purposes of the second clause of article 9, § 24 and therefore need not be annually funded.

Finally, the constitutional convention debates reinforce this conclusion. As this Court explained in *Studier*, 472 Mich at 657:

> "The only explicit elaboration on the term 'accrued financial benefits' was this remark by delegate Van Dusen:
>
> " '[T]he words "accrued financial benefits" were used designedly, so that the contractual right of the employee would be limited to the deferred compensation embodied in any pension plan, and that we hope to avoid thereby a proliferation of litigation by individual participants in retirement systems talking about the general benefits structure, or something other than his specific right to receive benefits.' " [*Id.*, quoting *Musselman v Governor*, 448 Mich 503, 510 n 8; 533 NW2d 237 (1995), quoting 1 Official Record, Constitutional Convention 1961, pp 773-774.][24]

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[24] In addition, Van Dusen stated:

> It is not intended that an individual employee should, as a result of this language, be given the right to sue the employing unit to require the actuarial funding of past service benefits, or anything of that nature. What it is designed to do is to say that when his benefits come due, he's got a contractual right to receive them. [1 Official Record, Constitutional Convention 1961, p 774.]

Thus, although there was much discussion at the constitutional convention of creating a contractual right to receive pension benefits, there was absolutely no discussion of creating a contractual right to tax-free pension benefits. It would seem that if the delegates had intended to create the latter right, they would at least have mentioned this in passing, particularly in light of the general proposition established in their new constitution against "surrender[ing], suspend[ing] or contract[ing] away" the Legislature's taxing authority. Const 1963, art 9, § 2. Even more telling is the lack of any reference to a contractual right to tax-free pension benefits in the Address to the People. Given that neither the actual language of § 24 nor the Address to the People mentions such a right, the ratifiers would have had absolutely no reason to suppose that, by adopting § 24, they would be creating a contractual right to tax-free pension benefits.

The "deferred compensation" protected as a "contractual obligation" by § 24 is the pension payments themselves earned by the retiree, while the tax exemption is something distinct and is not the subject of § 24.[25] The tax exemption is simply a postdistribution effect of the accrued financial benefits that have otherwise been paid in full. As the Ohio Supreme Court explained in upholding the validity of Ohio's decision to eliminate a public-employee-pension-tax exemption, "there is a definite legal distinction between reducing the rate of a pension and levying a tax upon the income received from that pension." *Herrick v Lindley*, 59 Ohio St 2d 22; 391 NE2d 729, 733 (1979). That is, "there is a distinction between the right to receive retirement benefits unfettered by subsequent reductions in the rate of those benefits and the right to a permanent tax exemption." *Id.*[26] That there is a distinction between the right to receive retirement benefits and the right to a tax exemption is illustrated by the fact that a retiree who moves out of Michigan is still entitled to retirement benefits but is not entitled to the tax exemption. That a retiree cannot be deprived of retirement benefits but can be deprived of the tax exemption underscores the

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[25] Chairman Van Dusen also stated that § 24 "was simply designed to put pension benefits earned in public service on the same basis as deferred compensation earned in private employment." 1 Official Record, Constitutional Convention 1961, p 773. Given that the Legislature is not prohibited from taxing deferred compensation earned in private employment, "put[ting] pension benefits earned in public service on the same basis as deferred compensation earned in private employment" would require that there likewise be no prohibition of the Legislature's taxing pension benefits earned in public service.

[26] See also *Spradling v Colorado Dep't of Revenue*, 870 P2d 521, 524 (Colo App, 1994) ("Because [the statute] does not reduce the amount of the pension benefits to which plaintiffs are contractually entitled, and because there is no contractual right to an income tax exemption for such benefits, we hold that the statute is not constitutionally invalid insofar as it subjects those benefits to state income tax.").

fact that the "accrued financial benefit" of a pension plan is the pension income itself, not any tax exemption that might at some moment in time be attached to that income.[27]

For these reasons, reducing or eliminating the statutory exemption for public-pension incomes as set forth in MCL 206.30 does not impair accrued financial benefits of a "pension plan [or] retirement system of the state [or] its political subdivisions" under Const 1963, art 9, § 24.

B. CONTRACTUAL OBLIGATION

The second issue contained in the Governor's request for an advisory opinion concerns whether reducing or eliminating the statutory tax exemption for pension

[27] The problem with Justice HATHAWAY's opinion is that it does not recognize this distinction between pension benefits and tax exemptions, but treats them as being one and the same and then summarily concludes that because pension benefits constitute an "accrued financial benefit," the applicable tax exemption must be one as well. It does this with no analysis of the dispositive language "accrued financial benefit" and thus offers no explanation for its conclusion that the tax exemption itself, as distinguished from the pension benefits, constitutes an "accrued financial benefit." Justice HATHAWAY contends that we "create[] an unnecessary distinction" because "a tax is a tax, whether it comes in the form of a direct tax increase or the elimination of a deduction." *Post* at 371. We agree that there is no significant distinction for present purposes between a tax increase and the elimination of a deduction, and we make no such distinction. Again, the distinction that Justice HATHAWAY misses is the one between pension benefits and tax exemptions, not the one between a tax increase and the elimination of a deduction. Finally, Justice HATHAWAY cites an opinion of the Attorney General for the proposition that a tax exemption is a "financial benefit" without noting that the Attorney General expressly stated in the same opinion that he was not answering the question that is now at issue: "whether the Legislature may, without violating Const 1963, art 9, § 24, limit or repeal the tax exemptions in the four retirement statutes . . . as to current retirees and members without providing equal alternative benefits in place thereof." OAG, 1991-1992, No 6697, p 121 (December 18, 1991).

incomes as set forth in MCL 206.30 impairs a contractual obligation in violation of Const 1963, art 1, § 10 or US Const, art I, § 10(1). Const 1963, art 1, § 10 provides, "No bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Similarly, US Const, art I, § 10(1) provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." As discussed earlier, Const 1963, art 9, § 24 provides that an accrued public pension is a "contractual obligation." However, as also discussed earlier, "the obligation of [the] contract" specifically consists of the pension income, not the tax exemption of that income, and thus reducing or eliminating the tax exemption does not affect, much less impair, the obligation of the contract.

Several of the amicus curiae briefs argue that regardless of whether the tax exemption is an "accrued financial benefit" and thus a "contractual obligation" for purposes of Const 1963, art 9, § 24, merely by enacting a statutory tax exemption, the Legislature created a contractual right to this exemption that cannot subsequently be diminished without violating Const 1963, art 1, § 10. However, as this Court has explained:

> Of primary importance to the viability of our republican system of government is the ability of elected representatives to act on behalf of the people through the exercise of their power to enact, amend, or repeal legislation. Therefore, a fundamental principle of the jurisprudence of both the United States and this state is that one legislature cannot bind the power of a successive legislature. . . .
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> * * *
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> Although this venerable principle that a legislative body may not bind its successors can be limited in some circumstances because of its tension with the constitutional

prohibitions against the impairment of contracts, thus enabling one legislature to contractually bind another, such surrenders of legislative power are subject to strict limitations that have developed in order to protect the sovereign prerogatives of state governments. A necessary corollary of these limitations that has been developed by the United States Supreme Court, and followed by this Court, is the *strong presumption that statutes do not create contractual rights*. This presumption, and its relation to the protection of the sovereign powers of a legislature, was succinctly described by the United States Supreme Court in [*Nat'l R Passenger Corp v Atchison, T & S F R Co*, 470 US 451, 465-466; 105 S Ct 1441; 84 L Ed 2d 432 (1985)]:

"For many decades, this Court has maintained that absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.' . . . This well-established presumption is grounded in the elementary proposition that the principal function of a legislature is not to make contracts, but to make laws that establish the policy of the state. . . . Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body. Indeed, ' "[t]he continued existence of a government would be of no great value, if by implications and presumptions, it was disarmed of the powers necessary to accomplish the ends of its creation." ' Thus, the party asserting the creation of a contract must overcome this well-founded presumption, . . . and we proceed cautiously both in identifying a contract within the language of a regulatory statute and in defining the contours of any contractual obligation." [*Studier*, 472 Mich at 660-662 (citations omitted; emphasis added).]

Accordingly, "[i]n order for a statute to form the basis of a contract, the statutory language 'must be "plain and susceptible of no other reasonable construction" than

that the Legislature intended to be bound to a contract.' " *Id*. at 662 (citations omitted). That is, "[b]efore a statute, particularly one relating to taxation, should be held to be irrepealable or not subject to amendment, an intent not to repeal or amend must be so directly and unmistakably expressed as to leave no reason for doubt. Otherwise the intent is not plainly expressed." *Harsha v Detroit*, 261 Mich 586, 594; 246 NW 849 (1933).

For example, "[i]f the statutory language 'provides for the execution of a written contract *on behalf of the state* the case for an obligation binding upon the state is clear.' " *Studier*, 472 Mich at 662, quoting *Nat'l R Passenger Corp*, 470 US at 466 (citation and quotation marks omitted). Statutes containing an express covenant not to amend the legislation are also deemed to create contractual obligations. *Studier*, 472 Mich at 663. "But, 'absent "an adequate expression of an actual intent" of the State to bind itself,' courts should not construe laws declaring a scheme of public regulation as also creating private contracts to which the state is a party." *Id.* at 662, quoting *Nat'l R Passenger Corp*, 470 US at 466-467, quoting *Wisconsin & Mich R Co v Powers*, 191 US 379, 386-387; 24 S Ct 107; 48 L Ed 229 (1903).[28]

As was the case in *Studier*, none of the statutory tax exemption provisions that are at issue here contain any language "provid[ing] for a written contract on behalf of the state of Michigan or even use terms typically associated with contractual relationships, such as 'contract,' 'covenant,' or 'vested rights.' " *Studier*, 472 Mich

[28] In *Studier*, 472 Mich at 668, this Court held that the statute establishing health-care benefits for public school retirees, MCL 38.1391(1), does not create a contractual right to receive health-care benefits because "the plain language of MCL 38.1391(1) does not clearly indicate that the Legislature intended to surrender its legislative powers through the statute's enactment . . . ."

at 663-664.[29] "Had the Legislature intended to surrender its legislative powers through the creation of con-

[29] See, for example, the former tax exemption provision of the State Employees' Retirement Act, MCL 38.40(1), as amended by 2002 PA 99, which provided:

> The right of a person to a pension, an annuity, a retirement allowance, any optional benefit, any other right accrued or accruing to any person under the provisions of this act, the various funds created by this act, and all money and investments and income of the funds, *are exempt* from any state, county, municipal, or other local tax. [Emphasis added.]

The fact that the language "are exempt" was put in the present tense indicates that the Legislature simply intended pension and retirement incomes to be exempt from taxation while this statutory language remained the law. However, it does not indicate any intent to forever prohibit a future Legislature from changing this law and making pension and retirement incomes subject to taxation. See also *Sheehy v Pub Employees Retirement Div*, 262 Mont 129, 134; 864 P2d 762, 765 (1993) ("[The statute] provides that state retirement benefits are exempted from state tax. The use of the present tense 'are' indicates that the statute is a statement of current policy regarding public employment. The statute contains no manifestation of legislative intent to create private and enforceable contractual rights . . . ; nor does it make or imply any promises regarding ongoing or future tax treatment of state retirement benefits.") (italics omitted).

Similarly, the Public School Employees Retirement Act formerly provided:

> A retirement allowance, an optional benefit, or any other benefit accrued or accruing to a person under this act, the reserves created by this act, and the money, investments, or income of those reserves *are exempt* from state, county, municipal, or other local tax and subject to the public employee retirement benefit protection act." [MCL 38.1346(1), as amended by 2002 PA 94 (emphasis added).]

The Michigan Legislative Retirement System Act formerly provided, "All retirement allowances and other benefits payable under this act and all accumulated credits of members, deferred vested members, and retirants in this retirement system *are not* subject to taxation by this state or any political subdivisions of this state." MCL 38.1057(1), as amended by 2002 PA 97 (emphasis added). The city library employees' retirement system act formerly provided:

tractual rights, it would have expressly done so by employing such terms." *Id.* at 664. And, as in *Studier*, "nowhere in the statute[s] did the Legislature covenant that it would not amend the statute[s] to remove or diminish the obligation" in question. *Id.* at 665. "Again, had the Legislature intended to surrender its power to make such changes, it would have done so explicitly." *Id.*[30] "Thus, there is no indication that the Legislature

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> When a system of retiring allowances is adopted under the provisions of this act, the reserve fund thereby provided shall be free from all state, county, township, city, village and school district taxes and the annuities payable to the members of the staff shall likewise be free from all such taxes. [MCL 38.705, as added by 1927 PA 339.]

And the Judges Retirement Act provided, "Distributions from employer contributions made pursuant to [MCL 38.2664(2) and (3)] and earnings on those employer contributions, and distributions from employee contributions made pursuant to [MCL 38.2664(3)] and earnings on those employee contributions, *are exempt* from any state, county, municipal, or other local tax." MCL 38.2670(1), as amended by 2002 PA 95 (emphasis added).

Each of these acts was amended to remove the statutory exemption from state taxes consistently with 2011 PA 38. See 2011 PA 41, 2011 PA 42, 2011 PA 43, 2011 PA 44, and 2011 PA 45. For example, as amended by 2011 PA 41, the State Employees' Retirement Act, MCL 38.40, now provides, in relevant part:

> (1) Except as otherwise provided in this section, the right of a person to a pension, an annuity, a retirement allowance, and any optional benefit and any other right accrued or accruing to any person under the provisions of this act, the various funds created by this act, and all money and investments and income of the funds are exempt from any state, county, municipal, or other local tax.
>
> (2) Beginning January 1, 2012, the right of a person to a pension, an annuity, a retirement allowance, and any optional benefit, and any other right accrued or accruing to any person under the provisions of this act, is subject to state tax upon distribution to the person from the various funds created by this act.

[30] As this Court stated in *Studier*, 472 Mich at 664 n 22:

that enacted [these provisions] intended to do anything beyond . . . set forth a policy to be pursued until one of its successor legislatures ordained a new policy." *Id.* at 665-666. Because there is no language in any of the statutory tax exemption provisions at issue here indicating that the Legislature intended to be contractually bound by these provisions forever, and because Const 1963, art 9, § 2 prohibits the Legislature from contracting away its taxing authority, we conclude that the tax exemption statutes do not create contractual rights that cannot be altered by the Legislature. Indeed, it is "well established that a taxpayer does not have a vested right in a tax statute or in the continuance of any tax law." *Detroit v Walker*, 445 Mich 682, 703; 520 NW2d 135 (1994); see also *Ludka v Dep't of Treasury*, 155 Mich App 250, 260; 399 NW2d 490 (1986) (noting that the Legislature is free to take rights that arise under a tax statute away at any time); *United States v Carlton*, 512 US 26, 33; 114 S Ct 2018; 129 L Ed 2d 22 (1994)

It is clear that the Legislature can use such nomenclature when it wishes to. For instance, when enacting 1982 PA 259, which requires the state treasurer to pay the principal of and interest on all state obligations, the Legislature provided in MCL 12.64: "*This act shall be deemed a contract* with the holders from time to time of obligations of this state." (Emphasis added.) Similarly, when enacting the State Housing Development Authority Act, 1966 PA 346, the Legislature provided in MCL 125.1434: "*The state pledges and agrees* with the holders of any notes or bonds issued under this act, *that the state will not limit or alter the rights vested in the authority to fulfill the terms of any agreements made with the holders thereof, or in any way impair the rights and remedies of the holders* until the notes or bonds, together with the interest thereon, with interest on any unpaid installments of interest, and all costs and expenses in connection with any action or proceeding by or on behalf of such holders, are fully met and discharged. The authority is authorized to include this pledge and agreement of the state in any agreement with the holders of such notes or bonds." [Emphasis added.]

("Tax legislation is not a promise, and a taxpayer has no vested right in the Internal Revenue Code.").[31]

For these reasons, reducing or eliminating the statutory tax exemption for pension incomes as set forth in MCL 206.30 does not impair any contractual obligation in violation of Const 1963, art 1, § 10 or US Const, art I, § 10(1). In short, we are able to identify absolutely no provision within either constitution that provides that public employees, and *only* public employees, are entitled in perpetuity to receive pension income without having to pay taxes on that income and that such income alone will be forever exempt from having to support the costs of government. The opposing Attorney General contends that, come war, come natural disaster, come impending bankruptcy, only the pension income of public employees, among all individual income, will be off-limits from ever being used to pay the costs of government, including, significantly, the costs of public employees themselves. The opposing Attorney General, in our judgment, argues in behalf of a Constitution that does not exist, and we firmly reject those arguments.

C. EQUAL PROTECTION

The third issue concerns whether determining eligibility for income-tax exemptions on the basis of date of birth as set forth in MCL 206.30(9) violates the equal protection of the law under Const 1963, art 1, § 2 or the Fourteenth Amendment of the United States Constitu-

[31] Indeed, in *Carlton*, 512 US at 33, the United States Supreme Court went so far as to hold that applying an amended tax statute *retroactively* does not violate the United States Constitution even when a taxpayer has "specifically and detrimentally relied on the preamendment version" of the tax statute. It is unnecessary that we address that question in the context of the Michigan Constitution.

tion. Const 1963, art 1, § 2 states, in pertinent part, "No person shall be denied the equal protection of the laws . . . ." Similarly, US Const, Am XIV, § 1 states, "[N]or shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."[32] "Of course, most laws differentiate in some fashion between classes of persons." *Nordlinger v Hahn*, 505 US 1, 10; 112 S Ct 2326; 120 L Ed 2d 1 (1992). Indeed, the enactment of laws that differentiate between classes of persons lies at the heart of the legislative power. Welfare laws that apportion benefits on the basis of income, criminal laws that establish terms of imprisonment on the basis of conduct and criminal histories, and tax laws that take into account such circumstances of the taxpayer as the number of children, the amount of charitable contributions, and the level of medical expenses all differentiate among legislatively determined classes of persons. "The Equal Protection Clause does not forbid classifications." *Id.* "It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Id.* "As a general

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[32] "This Court has held that Michigan's equal protection provision is coextensive with the Equal Protection Clause of the United States Constitution." *Shepherd Montessori Ctr Milan v Ann Arbor Charter Twp*, 486 Mich 311, 318; 783 NW2d 695 (2010).

> "By this, we do not mean that we are bound in our understanding of the Michigan Constitution by any particular interpretation of the United States Constitution. We mean only that we have been persuaded in the past that interpretations of the Equal Protection Clause of the Fourteenth Amendment have accurately conveyed the meaning of Const 1963, art 1, § 2 as well." [*Id.* at 319 n 7, quoting *Harvey v Michigan*, 469 Mich 1, 6 n 3; 664 NW2d 767 (2003).]

Cf. *Lind v Battle Creek*, 470 Mich 230, 235; 681 NW2d 334 (2004) (YOUNG, J., concurring) ("The Michigan Equal Protection Clause, Const 1963, art 1, § 2, unlike the federal counterpart contained in the Fourteenth Amendment, explicitly prohibits discrimination on the basis of race.") (emphasis omitted).

rule, 'legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality.' " *Id.*, quoting *McGowan v Maryland*, 366 US 420, 425-426; 81 S Ct 1101; 6 L Ed 2d 393 (1961). Accordingly, the United States Supreme Court has made it "clear that, unless a classification warrants some form of heightened review because it jeopardizes exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic, the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Nordlinger*, 505 US at 10.[33] This is known as the "rational basis" standard. Any less deferential standard of review would transform this Court into a body in which review, and reversal, of the judgments of the Legislature would become increasingly routine given the ordinary incidence of laws in which the Legislature has established classifications among persons.

The opposing Attorney General argues that a heightened standard of review—specifically, strict scrutiny—is required because there is a constitutional right to a tax-free pension. But, of course, this Court has determined this proposition to the contrary. For the reasons discussed with regard to the first two issues, there is no constitutional right to a tax-free pension. There is no right on the part of public employees, alone among

[33] The corollary of this is that "[f]or a decision to be subject to [strict] scrutiny, it must be a classification that is based on 'suspect' factors such as race, national origin, ethnicity, or a 'fundamental right.' " *Phillips*, 470 Mich at 432 (citations omitted); see also *Massachusetts Bd of Retirement v Murgia*, 427 US 307, 312; 96 S Ct 2562; 49 L Ed 2d 520 (1976) ("[E]qual protection analysis requires strict scrutiny of a legislative classification only when the classification impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.").

all persons, to such a benefit. Furthermore, even if there were such a constitutional right, not all constitutional rights warrant application of the strict-scrutiny standard, only those that are considered "fundamental rights," i.e., those rights "traditionally protected by our society" and "implicit in the concept of ordered liberty." *Phillips*, 470 Mich at 434 (citations and quotation marks omitted). The right to a tax-free pension has never been held to be a constitutional right, much less a fundamental right.[34]

It is uncontested that the classification at issue here does not involve a suspect class because age has never been held to constitute such a class. *Massachusetts Bd of Retirement v Murgia*, 427 US 307, 314; 96 S Ct 2562; 49 L Ed 2d 520 (1976) ("Even if the statute could be said to impose a penalty upon a class defined as the aged, it would not impose a distinction sufficiently akin to those classifications that we have found suspect to call for strict judicial scrutiny."); *Kimel v Florida Bd of Re-*

[34] The opposing Attorney General also argues that differential treatment on the basis of marital status requires a higher level of scrutiny. However, marital status classifications have never been accorded any heightened scrutiny under the Equal Protection Clause. See *Smith v Shalala*, 5 F3d 235, 239 (CA 7, 1993) ("Because [a] classification based on marital status does not involve a suspect class . . . , we must examine it under the rational basis test."), cert den 510 US 1198 (1994); *Zablocki v Redhail*, 434 US 374, 403; 98 S Ct 673; 54 L Ed 2d 618 (1978) (Stevens, J., concurring) ("When a state allocates benefits or burdens, it may have valid reasons for treating married and unmarried persons differently. Classification based on marital status has been an accepted characteristic of tax legislation, Selective Service rules, and Social Security regulations."). There is a rational basis for allowing an individual who otherwise would not receive the pension exemption to receive it if his or her spouse was born before 1946. Married persons plan for their financial futures together, and when one spouse cannot easily adjust to or absorb changes in a tax law because of his or her age, the other spouse necessarily shares in that burden. The marital-status distinction rationally furthers the state's legitimate interest in protecting the reasonable reliance interests of both retirees and their spouses.

gents, 528 US 62, 83; 120 S Ct 631; 145 L Ed 2d 522 (2000) ("[A]ge is not a suspect classification under the Equal Protection Clause. States may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest.") (citations omitted). Because the classification at issue here does not pertain to either a fundamental right or a suspect class, the rational-basis standard is applicable. "[B]ecause an age classification is presumptively rational, the individual challenging its constitutionality bears the burden of proving that the 'facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " *Kimel*, 528 US at 84, quoting *Vance v Bradley*, 440 US 93, 111; 99 S Ct 939; 59 L Ed 2d 171 (1979).

The rational-basis standard is "a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one." *Murgia*, 427 US at 314. "Perfection in making the necessary classifications is neither possible nor necessary." *Id.* "Such action by a legislature is presumed to be valid." *Id.* Therefore, under the rational-basis standard, " 'courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose.' " *Phillips*, 470 Mich at 433, quoting *Crego v Coleman*, 463 Mich 248, 259; 615 NW2d 218 (2000). "The rational basis test does not test 'the wisdom, need, or appropriateness of the legislation . . . .' " *Phillips*, 470 Mich at 434, quoting *Crego*, 463 Mich at 260. Instead, "[t]his highly deferential standard of review requires a challenger to show that the legislation is 'arbitrary and wholly unrelated in a rational way to the objective of the statute.' " *Phillips*, 470 Mich at 433,

quoting *Crego*, 463 Mich at 259, quoting *Smith v Employment Security Comm*, 410 Mich 231, 271; 301 NW2d 285 (1981).

"This standard is especially deferential in the context of classifications made by complex tax laws." *Nordlinger*, 505 US at 11. " '[I]n structuring internal taxation schemes "the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." ' " *Id.*, quoting *Williams v Vermont*, 472 US 14, 22; 105 S Ct 2465; 86 L Ed 2d 11 (1985), quoting *Lehnhausen v Lake Shore Auto Parts Co*, 410 US 356, 359; 93 S Ct 1001; 35 L Ed 2d 351 (1973); see also *Regan v Taxation with Representation of Washington*, 461 US 540, 547; 103 S Ct 1997; 76 L Ed 2d 129 (1983) ("Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes."). Indeed, " 'in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.' " *San Antonio Indep Sch Dist v Rodriguez*, 411 US 1, 41; 93 S Ct 1278; 36 L Ed 2d 16 (1973), quoting *Madden v Kentucky*, 309 US 83, 88; 60 S Ct 406; 84 L Ed 590 (1940). Given " '[t]he broad discretion as to classification possessed by a legislature in the field of taxation [that] has long been recognized . . . , the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes . . . .' " *San Antonio Indep Sch Dist*, 411 US at 40-41, quoting *Madden*, 309 US at 87-88.[35] " 'The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support

[35] " '[T]he passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies.' " *San Antonio Indep Sch Dist*, 411 US at 40, quoting *Madden*, 309 US at 88.

it.' " *Lehnhausen*, 410 US at 364, quoting *Madden*, 309 US at 88.

In this case, there is a rational basis for grounding a taxpayer's eligibility for the pension exemption upon date of birth: older persons, who are obviously more likely to be already retired or approaching retirement, have relied more on the exemption and will be less able to garner additional future income to offset the loss of the exemption. The United States Supreme Court "has acknowledged that classifications serving to protect legitimate expectation and reliance interests do not deny equal protection of the laws." *Nordlinger*, 505 US at 13.[36] Indeed, " '[t]he protection of reasonable reliance interests is not only a legitimate governmental objective: it provides an exceedingly persuasive justification . . . .' " *Id*., quoting *Heckler v Mathews*, 465 US 728, 746; 104 S Ct 1387; 79 L Ed 2d 646 (1984). Recognizing that older individuals may have a "diminishing earning capacity" also constitutes an altogether legitimate reason for basing eligibility for the pension exemption on age. *Cruz v Chevrolet Grey Iron Div of Gen Motors Corp*, 398 Mich 117, 133-134 (opinion by COLEMAN, J.), 137-138 (opinion by LEVIN, J.); 247 NW2d 764 (1976) (holding that the "diminishing earning capacity" of older workers constitutes a rational basis for the provision in the Worker's Disability Compensation Act, MCL 418.357, that provides for reduction in compensation payments to employees over the age of 65).[37]

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[36] There is an obvious distinction between this Court's recognition that older employees may have relied on an expectation of a certain level of pension, and even on a tax-free pension, and holding that these employees possess a constitutional right to such an exemption. The former implicates a matter of public policy, and the latter implicates a matter of constitutional law.

[37] We also reject the opposing Attorney General's argument that because 2011 PA 38 creates closed classes—that is, it stratifies groups by

For these reasons, determining eligibility for income-tax exemptions on the basis of age or date of birth as set forth in MCL 206.30(9) does not violate the equal protection of the law under Const 1963, art 1, § 2 or the Fourteenth Amendment of the United States Constitution.[38]

D. GRADUATED INCOME TAX

The final issue concerns whether determining eligibility for income-tax exemptions and deductions on the basis of total household resources as set forth in MCL 206.30(7) and (9) creates a graduated income tax in violation of Const 1963, art 9, § 7. Const 1963, art 9, § 7 provides, "No income tax graduated as to rate or base shall be imposed by the state or any of its subdivisions." A graduated income tax is generally understood to be a tax on income that imposes a proportionately greater tax burden on the earnings of higher-income taxpayers

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date of birth and not merely by age, thereby prohibiting new members from joining the more favorably treated group as they themselves age—it is a capriciously designed system. To the contrary, there is a rational basis for this: the state is attempting to phase out the availability of the broadest exemptions and deductions for pension incomes altogether. While the legislation is designed to protect older pensioners who have greater reliance on the pre-2011 PA 38 tax rules, the key protection built in to the stratified system is *from the changes immediately occurring in the tax code in 2012*. That is, the Legislature has determined that it is not necessary to protect pensioners progressively as they age because the younger pensioners are at the time of the changes in 2012, the better they will be able to anticipate and plan for their tax liability when they retire. The primary goal, which the stratified system achieves at a more gradual pace, is to equalize the tax burden among Michigan citizens, by means of having public pensioners share to a greater extent in the cost of government from the income they are continuing to earn in retirement. Whether we agree or disagree with these policy determinations, there exists a rational basis to support the system designed by the Legislature to accomplish this goal, and thus it is neither capricious nor arbitrary.

[38] All seven justices agree that there is no equal protection violation.

than on that of lower-income taxpayers.[39] Const 1963, art 9, § 7 prohibits both an income tax graduated as to rate and an income tax graduated as to base. It is uncontested by the parties that the provisions at issue here do not create an income tax graduated as to "rate" because all individual taxpayers will be required to pay a flat 4.35 percent income tax. Instead, the issue is whether the provisions create an income tax graduated as to "base" because only certain taxpayers, depending on their income levels, will be entitled to the personal exemption and to the $20,000 or $40,000 deduction.

It is also uncontested that a taxpayer's "base" consists of his or her net taxable income and that exemptions and deductions reduce a taxpayer's base by reducing the amount of a taxpayer's income subject to taxation.[40] That is, if a taxpayer is entitled to an exemption or deduction, his or her base is reduced, and if a taxpayer is not entitled to an exemption or deduction, his or her base is not reduced. Concomitantly, an *income-based* deduction or exemption is one to which taxpayers are, or are not, entitled as a function of their incomes. Traditionally, in a progressive or graduated tax system, taxpayers with lower incomes are allowed the exemption or deduction, while taxpayers with higher incomes are deprived of the exemption or deduction in order to create graduation. Consequently, everything else being equal, taxpayers with higher incomes

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[39] See OAG, 1965-1966, No 4428, p 53 (March 31, 1965) ("[T]he result forbidden by the Constitution is the imposition of a proportionately greater income tax burden on the income of high income groups than on that of low income tax groups.").

[40] See Black's Law Dictionary (6th ed), which defines "tax deduction" as "[a] subtraction from gross income in arriving at taxable income" and defines "tax exemption" as "[i]mmunity from the obligation of paying taxes in whole or in part." "Tax deductions are technically different from tax exemptions, but the effect of both is to reduce gross income in computing taxable income." Black's Law Dictionary (5th ed), p 1310.

will have *disproportionately* larger bases than taxpayers with lower incomes because a higher proportion of their income is included in their base. Therefore, income-based exemptions and deductions result in an income tax that is graduated as to base, which can occur even when all income is taxed at a flat rate.[41] This is exactly what the ratifiers of our Constitution explicitly prohibited by adopting § 7, which provides, "No income tax graduated as to . . . base shall be imposed by the state . . . ."[42] We do not believe that the ratifiers could have been any clearer in their intent to prohibit a graduated income tax, and we believe that the statutory provisions at issue here create such a prohibited tax.

MCL 206.30(7) conditions a taxpayer's entitlement to the personal exemption on his or her income. If a taxpayer's income is less than $75,000 for a single

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[41] It is not in dispute that the Legislature can enact nonincome-based exemptions and deductions even though such exemptions and deductions may have the incidental effect of creating different *effective* tax rates. See the Address to the People, which specifically states that "[t]he legislature could prescribe reasonable exemptions for a flat rate tax." 2 Official Record, Constitutional Convention 1961, p 3399. Accordingly, the supporting Attorney General's point that there are already numerous nonincome-based exemptions in Michigan law is not germane to what is at issue here, i.e., whether income-based exemptions and deductions violate Const 1963, art 9, § 7.

[42] The supporting Attorney General argues that Const 1963, art 9, § 7 only prohibits an income tax in which, as this Court stated in *Kuhn v Dep't of Treasury*, 384 Mich 378, 388-389; 183 NW2d 796 (1971), "different rates of tax [are applied to] different segments of taxable income of the person being taxed." However, this argument takes that statement from *Kuhn* out of context. *Kuhn* also held that the act at issue does not violate § 7 because "[t]he rates of tax imposed by the Act are *uniformly applicable to all taxable income of every taxpayer in each class*" and " [t]he credits for property and income taxes are allowed against the tax liability of *all taxpayers without regard to their income*." *Id.* at 389 (citation and quotation marks omitted; emphasis added). This language clearly demonstrates that *Kuhn* recognized that treating *different* taxpayers *differently* on the basis of their income could well run afoul of § 7.

return or $150,000 for a joint return, the taxpayer is fully entitled to the $3,700 personal exemption. However, if a taxpayer's income is between $75,000 and $100,000 for a single return or between $150,000 and $200,000 for a joint return, the taxpayer is only entitled to a declining proportion of the exemption, and this proportion depends entirely on the extent to which the taxpayer's income exceeds the threshold levels of $75,000 for a single return or $150,000 for a joint return.[43] Finally, if a taxpayer's income exceeds $100,000 for a single return or $200,000 for a joint return, the taxpayer is not entitled to any portion of the $3,700 personal exemption. This "phase-out" of the personal exemption creates an income tax graduated as to base because entitlement to the exemption—and the extent of such entitlement, which reduces the taxpayer's base—is entirely dependent on the taxpayer's income level.[44] To the extent that MCL 206.30(7) conditions a taxpayer's entitlement to the personal exemption on his or her income, it is an income tax

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[43] More specifically, MCL 206.30(7) provides, in pertinent part:

> For a taxpayer whose total household resources are $75,000.00 or more for a single return or $150,000.00 or more for a joint return, the personal exemption allowed under [MCL 206.30(2)] shall be adjusted by multiplying the exemption for the tax year for a single return by a fraction, the numerator of which is $100,000.00 minus the taxpayer's total household resources, and the denominator of which is $25,000.00, and for a joint return by a fraction, the numerator of which is $200,000.00 minus the taxpayer's total household resources, and the denominator of which is $50,000.00.

[44] Phase-outs have been commonly recognized as a means of creating a graduated or "progressive" income tax. See, e.g., Schuyler, *Phase-Outs Are Bad Tax Policy*, Institute for Research on the Economics of Taxation Economic Policy Bulletin No. 71, January 1998, p 4 <http://iret.org/pub/BLTN-71.PDF> ("Phase-outs . . . heighten tax progressivity.") (accessed October 31, 2011); Viard, *The Tax Code's Burdens on Families and Individuals*, American Enterprise Institute for Public Policy Research, April 13, 2011 <http://www.aei.org/article/103457> ("Phase-outs add to the progressivity of the tax system by raising taxes on those with

graduated as to base[45] and plainly violative of Const

higher incomes through the reduction or elimination of selected tax preferences. Like other measures that promote progressivity, phase-outs also increase the effective marginal tax rates faced by taxpayers.") (accessed October 31, 2011); *A Stealth Tax Hike*, Wall St J, June 29, 2011 <http://online.wsj.com/article//SB10001424052702304314404576414062080484714.html> ("The idea is that once taxpayers earn a certain amount of money . . . they would begin to lose the value of the various deductions they're entitled to under the law. . . . Earn enough money and soon the value of those deductions goes to zero. The political point of this exercise is to raise marginal tax rates without appearing to do so. . . . The phase-out gambit is an attempt to shoe-horn more progressivity into the tax code without admitting it, and to do so in such a way that only tax experts will know what's going on.") (accessed October 31, 2011); Mitchell, *Lowering Marginal Tax Rates: The Key to Pro-Growth Tax Relief*, The Heritage Foundation, May 22, 2001 <http://www.heritage.org/research/reports/2001/05/lowering-marginal-tax-rates> ("Known as 'phase-outs,' these provisions withdraw certain tax benefits in the code when income reaches a certain level. Phase-outs have the effect of raising marginal tax rates by reducing the amount of money that can be deducted (or credited or exempted) from taxable income.") (accessed October 31, 2011); National Commission on Restructuring the Internal Revenue Service, *A Vision for a New IRS*, June 25, 1997, Appendix H, p 36 <http://www.house.gov/natcommirs/report1.pdf> ("[P]hase-outs are intended to increase progressivity by increasing the tax burden of higher income taxpayers . . . .") (accessed October 31, 2011).

[45] The supporting Attorney General argues that this is not true because the taxpayer's entitlement to the exemption is conditioned on the taxpayer's "total household resources," not on his or her income as defined by federal adjusted gross income (AGI). Given that the term "total household resources" is defined as including "all *income* received by all persons of a household in a tax year while members of a household," MCL 206.508(4) (emphasis added), we are unpersuaded by this argument. That this definition differs from the federal definition of "income" is also of no consequence because federal AGI is not the only proxy for income. "Income" can be defined on the margins in many different ways and still be recognizable as such. Accordingly, when the supporting Attorney General argues merely that "total household resources" is calculated differently from AGI or even "taxable income" as defined in MCL 206.30(1), this does not show that *the concept of "total household resources" differs qualitatively from the concept of income*. The Legislature cannot avoid the constitutional prohibition of a graduated income tax by simply replacing the term "income" with the term "total household resources" when these two terms are largely equivalent. That one term may include some forms of income that the other does not does not alter the fact that both terms are still at their core referring to income.

1963, art 9, § 7.[46]

With regard to the $20,000/$40,000 deduction, MCL 206.30(9) conditions a taxpayer's entitlement to the $20,000 deduction for a single return or $40,000 deduction for a joint return on his or her income. If a taxpayer's income is $75,000 or less for a single return or $150,000 or less for a joint return, the taxpayer may be entitled to the $20,000/$40,000 deduction. However, if the taxpayer's income exceeds $75,000 for a single return or $150,000 for a joint return, the taxpayer is not entitled to the $20,000/$40,000 deduction. This $75,000/$150,000 income limitation creates an income tax graduated as to base because entitlement to the $20,000/$40,000 deduction, which reduces a taxpayer's base, is entirely a function of the taxpayer's income level. Once again, to the extent that MCL 206.30(9) conditions a taxpayer's entitlement to the $20,000/$40,000 deduction on his or her income, it is an income tax graduated as to base and plainly violative of Const 1963, art 9, § 7.[47]

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[46] The supporting Attorney General's answer to the following question suggests what would be left of the Constitution's prohibition against a graduated income tax if his arguments on income-based phase-outs prevailed:

> *Justice Markman*: [I]s it your argument that . . . akin to the alternative minimum tax which we have in the federal system, the Legislature could phase-out whatever deductions or exemptions it wanted to, [it] could phase them out at whatever rate of acceleration it wanted to, and it could phase them out completely at whatever low level it wanted to, and not be in violation of art 9, § 7.
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> *Supporting Attorney General*: That is correct.

[47] To illustrate how 2011 PA 38 creates a graduated base by conditioning the receipt of the *personal exemption* on a taxpayer's income, consider the following individual taxpayers each taxed at a flat rate:

The supporting Attorney General argues that the "base" language *only* prohibits taxation that is piggybacked on the federal tax liability. In support of this argument, he cites the Address to the People, which stated, in pertinent part:

Income	Pre-38 Exemption	Tax Base Exemption	PA 38	PA 38 Tax Base
$10,000	3,600	6,400	3,600	6,400
$50,000	3,600	6,400	3,600	46,400
$87,500	3,600	83,900	1,800	85,700
$100,000	3,600	96,400	0	100,000

The personal exemption is tied to inflation: in 2010 it was set at $3,600; in 2011, it will be $3,700. The exemption is kept constant here for demonstration purposes. Under the pre-2011 PA 38 exemption, every taxpayer receives a $3,600 personal exemption off the top of household income, and thus each taxpayer's base is reduced by the set amount irrespective of income. However, 2011 PA 38 alters the personal exemption system by phasing out the personal exemption at $75,000 and completely eliminating it at $100,000. Thus, the two right columns on the chart illustrate how the current income tax exemption would be affected by the new income-dependent provisions and how the exemption phase-out is precisely the kind of graduated income tax base that the Constitution prohibits: the two highest earners illustrated have larger tax bases on which they must pay the flat 4.35 percent tax rate, and their tax bases are larger to the extent that the exemption does not apply to them *for no other reason than their higher incomes*. By basing an income exemption solely on income, 2011 PA 38 effectively delays the point from which the tax clock will begin to run on income for some, but not all, taxpayers. Accordingly, it is contrary to a flat-tax system.

The $20,000 deduction employs a similar graduated structure by eliminating the ability to claim the deduction for earners who make more than $75,000. The only notable difference between the two is that instead of providing a phase-out as the personal exemption does, it employs a "cliff" whereby as soon as an individual taxpayer earns more than $75,000, he or she loses the entire deduction. Thus, this also impermissibly conditions the receipt of a deduction affecting tax base on income criteria, thereby again creating impermissible graduation. Within the range in which both the exemption and the deduction would be phased out and/or eliminated ($75,000-$100,000), earners with pension income would incur the highest marginal tax rates by far under the statute—the closer their earnings to the lower figure, the higher their rate.

> This is a new section making it clear that neither the state nor any local unit of government may impose a graduated income tax. The words "or base" are necessary to prevent "piggyback" taxation based on the federal tax liability. Without such language, a tax nominally imposed at a flat rate might actually adopt all of the graduation of the federal tax. [2 Official Record, Constitutional Convention 1961, p 3399.]

This language certainly does indicate that one purpose of using the term "base" was to prevent piggyback taxation, in which tax graduation is achieved by means of imposing a state income tax defined in terms of a particular percentage of the graduated federal income tax. However, nothing in the Address—and, even more significantly, nothing in the text of the Constitution itself—suggests that this was the *only* intended purpose of using "base." The necessary implication of the supporting Attorney General's argument is that the constitutional ratifiers intended to prohibit one, and only one, specific means of creating a graduated base, while permitting all other means of creating a graduated base. We do not believe that such an implication can fairly be drawn from a provision of the Constitution that states, "*No* income tax graduated as to . . . base" shall be imposed by the state. Const 1963, art 9, § 7 (emphasis added).

This Court's understanding of the "base" language was also expressed by the delegates during the constitutional convention debates. For example, Delegate Van Dusen explained:

> Without the words "or base" you do not really have any protection against an *indirectly* graduated state income tax, because a flat rate tax imposed upon the federal tax liability would simply pick up all of the graduation of the federal liability. Without these words "or base" there is no question but what in my judgment a nominally flat rate tax could be made a graduated

> income tax. [1 Official Record, Constitutional Convention 1961, p 894 (emphasis added).]

That the delegates understood their new constitutional provision to prohibit the imposition of a graduated income tax, directly or indirectly, is clear. As Delegate Van Dusen further explained:

> The prohibition against the graduated income tax with which we are now dealing is one which has not been in our constitution up until now largely because the evil of the graduated income tax has not been as apparent until the last twenty years. The progressivity, the steep graduation of our federal system has taught us that this is a problem, and if there is to be some balance in our total tax structure—all of us, after all, are federal taxpayers as well as state taxpayers—this is a limitation which we as citizens of this state may reasonably impose upon our legislature. [*Id.* at 879-880.]

And Delegate Henry Woolfenden explained:

> This country has been built, in my judgment, in my conviction, because of equality of opportunity and not because of legislative equality. If we want to make equal by legislation, then we should join some socialist government; but I am in favor of equality of opportunity, and I think a graduated income tax which says if my next door neighbor earns twice as much money as I do that he should not pay twice as much, he should pay 4 times as much, is essentially an immoral tax. I am absolutely opposed to it . . . . I do not believe we are hamstringing the legislature; I think we are merely stating the American philosophy of free enterprise and equality of opportunity. [*Id.* at 888.][48]

And Delegate O. Lee Boothby explained:

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[48] The constitutional convention record indicates that an applause followed this statement and that several other delegates expressed their agreement.

> There are 2 uses of taxes. The one use is to take care of the legitimate needs of government and that is the legitimate use, and the other use that has been seized upon by some people is to use taxation for the principle of distributing wealth. This is what I call a Robin Hood style of government where you take it from the rich and give it to the poor. I do not believe this is the legitimate purpose of taxation and I feel that it is necessary to write into the constitution a prohibition against a government adopting this theory of taking it from the rich and distributing it and leveling all people to the same status in society.
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> * * *
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> . . . I thought it was most interesting to note that 2,300 years ago the Greeks tried the so called progressive income tax—and there is nothing progressive about an income tax, it was tried 2,300 years ago by the Greeks, and a leading scholar of that day, Socrates, made this comment; he said:
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> "It would appear that success is to be punished; that exorbitant taxes have made it a crime for man to prosper. The end result of such order can only be removal of incentive, the discouragement of our people and the destruction of our free society."
>
> When a few years later the Spartans came and attacked Athens, the Greeks did not seem to feel they had anything to fight for. [*Id.* at 890.]

Regardless of whether one today agrees or disagrees with the reasoning of the delegates in adopting Const 1963, art 9, § 7, one thing is clear: the delegates' understanding of this constitutional provision was that it would prohibit a graduated income tax, plain and simple,[49] and there is nothing whatsoever in the express

[49] Given the rationale so clearly expressed by delegates in support of the prohibition of a graduated income tax, there is no conceivable reason why they would have been any less concerned about a graduated income tax that is created *directly* by conditioning eligibility for deductions and exemptions on taxpayers' income levels than they would have been about

language of this provision that would suggest in any way that the ratifiers' understanding was any different. Indeed, it is hard to identify any significant provision of the Michigan Constitution that is more explicit and more straightforward than Const 1963, art 9, § 7.[50]

This clarity undoubtedly explains Attorney General Frank Kelley's understanding of § 7 in 1965:

> The term "graduated rate" was used in reference to the Federal income tax rate structure. . . . The base restriction was to prohibit graduation by *indirection*. . . .
>
> * * *
>
> Graduation as to base means producing the effect of a tax graduated as to rate by reducing the tax base for lower incomes and increasing it for higher incomes received by a particular class of taxpayers within a tax period. In either instance, the result forbidden by the Constitution is the imposition of a proportionately greater income tax burden on the income of high income groups than on that of low income tax groups. Granting of a deduction and/or applying a uniform rate to all in a class is valid so long as the classification is reasonable and is not made in reference to the amount of

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a graduated income tax that is created *indirectly* by imposing an income tax defined in terms of a particular percentage of the undeniably graduated federal income tax.

[50] It is also interesting to note that the people of this state have rejected, in substantial numbers, three efforts to *repeal* the prohibition against a graduated income tax in Const 1963, art 9, § 7. See Citizens Research Council, *Amending the Michigan Constitution: Trends and Issues*, No 360-03 at 8 (March, 2010) <http://www.crcmich.org/PUBLICAT/2010s/2010/rpt36003.html> (accessed November 1, 2011). A 1968 repeal proposal was rejected by 76.7 percent of the voters; a 1972 repeal proposal was rejected by 68.7 percent of the voters; and a 1976 repeal proposal was rejected by 72.2 percent of the voters. See Michigan Department of State, *Initiatives and Referendums under the Constitution of the State of Michigan of 1963*, December 5, 2008 <http://www.michigan.gov/documents/sos/Const_Amend_189834_7.pdf> (accessed November 1, 2011).

> income received in a tax period. [OAG, 1965-1966, No 4428, pp 52-53 (March 31, 1965) (emphasis added).]

Furthermore, this is also the understanding of § 7 adopted by this Court. In *Kuhn v Dep't of Treasury*, this Court held that tax credits for property tax and city income tax liability did not violate Const 1963, art 9, § 7 because, as the Court of Appeals had explained,

> "[t]he credits for property and income taxes are allowed against the tax liability of all taxpayers *without regard to their income*. The limitations upon the amounts of credits that may be claimed by a taxpayer are *not based upon the taxpayer's income*; the effect is not to impose a tax violative of the constitutional prohibition against a tax graduated as to rate or base." [*Kuhn v Dep't of Treasury*, 384 Mich 378, 389; 183 NW2d 796 (1971), quoting *Kuhn v Dep't of Treasury*, 15 Mich App 364, 371; 166 NW2d 697 (1968) (emphasis added).]

That this Court focused on the fact that a taxpayer's entitlement to the credits was not determined by the taxpayer's income—and ultimately upheld the credits—suggests that it may have believed that basing a taxpayer's entitlement to a credit on his or her income might run afoul of Const 1963, art 9, § 7.[51] Thus, the implication of this Court's reasoning in *Kuhn* is that the Court believed that an income-based credit *might* be a "tax violative of the constitutional prohibition against a tax graduated as to rate or base."

Indeed, in *Butcher v Dep't of Treasury*, we recognized that "by closely examining the credits, exclusions, and exemptions . . . challenged [in *Kuhn*], we at least implied that a constitutional violation can occur by the use of

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[51] See also *Rosenbaum v Dep't of Treasury*, 77 Mich App 332, 336; 258 NW2d 216 (1977) ("Once the credit is computed it is allowed *without regard to the taxpayer's income*. Therefore, it does not create either directly *or indirectly* a graduated tax rate or base.") (emphasis added).

income criteria for determining their amounts" and that " '[t]he dispositive question [was] whether the credit at issue indirectly creates a progressive or graduated *income tax rate*.' " *Butcher v Dep't of Treasury*, 425 Mich 262, 273-274; 389 NW2d 412 (1986), quoting *Butcher v Dep't of Treasury*, 141 Mich App 116, 121; 366 NW2d 15 (1984) (emphasis in the original). We held that the credit at issue, i.e., the property-tax credit, did not create a graduated income tax even though it was income-dependent because it was "in effect a *property tax rebate* that employs the income tax as a vehicle for its reconciliation" and, thus, "art 9, § 7, which is concerned only with *income taxes*, [was] inapplicable . . . ." *Butcher*, 425 Mich at 276 (emphasis added).[52] We reached this conclusion because " 'a property taxpayer may file for this property tax rebate and receive such a rebate even if the computed rebate exceeds the amount of income taxes the property taxpayer might owe or even if the property taxpayer has no state income tax liability whatsoever.' " *Id.* at 274, quoting *Butcher*, 141 Mich App at 122. Unlike the property-tax credit at issue in *Butcher*, it is uncontested that the income-tax exemptions and deductions at issue in the instant case are clearly *income taxes*. The only question is whether they are *graduated* income taxes and, for the reasons explained above, we conclude that they are.

We conclude that determining eligibility for income-tax exemptions and deductions on the basis of total household resources as set forth in MCL 206.30(7), or age and total household resources as set forth in MCL 206.30(9) creates a graduated income tax in violation of Const 1963, art 9, § 7.[53]

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[52] More specifically, the issue involved an amendment of an already existing local property tax credit that reduced this credit by 10 percent for each $1,000 of household income in excess of $65,000.

[53] All seven justices agree that MCL 206.30(7) and (9) create a graduated income tax in violation of Const 1963, art 9, § 7.

E. SEVERABILITY

Pursuant to MCL 8.5, these portions of 2011 PA 38, in our judgment, can be severed from the remainder of the act, which is constitutional with respect to all the issues raised.[54] MCL 8.5 provides:

> In the construction of the statutes of this state the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the legislature, that is to say:
>
> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, provided such remaining portions are not determined by the court to be inoperable, and to this end acts are declared to be severable.

This Court has long recognized that "[i]t is the law of this State that if invalid or unconstitutional language can be deleted from an ordinance and still leave it complete and operative then such remainder of the ordinance be permitted to stand." *Eastwood Park Amusement Co v East Detroit Mayor*, 325 Mich 60, 72; 38 NW2d 77 (1949). The only unconstitutional portions of the act at issue here are those that ground eligibility for the personal exemption and for the $20,000/$40,000 deduction on the taxpayer's income.

We are convinced that severing these unconstitutional provisions is not inconsistent with the manifest

[54] At oral argument, the supporting Attorney General, i.e., the attorney representing the position of the Governor and the Legislature, indicated that *if* this Court were to conclude that portions of the act are unconstitutional—as we now do—the remedy would be to sever the unconstitutional portions of the act while preserving intact the remainder of the act.

intent of the Legislature. MCL 8.5. First, there is no indication in the act that the drafters of 2011 PA 38 intended a different severability rule than MCL 8.5 to apply. Second, this is the remedy expressly requested by the supporting Attorney General, who represents the views of a majority of the Legislature. And third, it seems clear to this Court that the Legislature "would have passed the statute had it been aware that portions therein would be declared to be invalid and, consequently, excised from the act." *Pletz v Secretary of State*, 125 Mich App 335, 375; 336 NW2d 789 (1983); see also *Eastwood Park Amusement*, 325 Mich at 73 (stating the general rule that unconstitutional provisions may be severed even absent a severability clause if, among other conditions, "it is clear from the ordinance itself that it was the intent of the legislature to enact these provisions irrespective of the others") (citation and quotation marks omitted). As the Legislature stated in the title of the act, 2011 PA 38 is "[a]n act to meet deficiencies in state funds . . . ." The language limiting the personal exemption and the $20,000/$40,000 deduction are but two ways in which the Legislature has sought to accomplish this goal. Although the extent to which 2011 PA 38 addressed "deficiencies in state funds" will be diminished to a small degree as the result of the severance, what will remain nonetheless enables the Legislature to realize its stated objectives. As the result of severance, the estimated level of revenues from 2011 PA 38 will be reduced from $1.4237 billion in fiscal year 2012-2013 to $1.3325 billion, a reduction of 6.4 percent.[55] We believe that, had the Legislature "been aware that portions [of 2011 PA 38] would be declared to be invalid and, consequently, excised from the act,"

[55] See House Legislative Analysis, HB 4361 & 4362, June 8, 2011, p 11.

Pletz, 125 Mich App at 375, it would nonetheless have enacted the remainder of this statute.

In addition, we are convinced that the remainder of the act can be given effect without the invalid portions. See MCL 8.5. When the unconstitutional language is severed, what remains is complete in and of itself, logical in its formulation and organization, and clearly in furtherance of the Legislature's stated goal of addressing "deficiencies in state funds."

In view of what we perceive to be the Legislature's intentions, and because severing the invalid portions does not render the remaining portions of 2011 PA 38 "inoperable," MCL 8.5, we sever the unconstitutional portions of MCL 206.30 as follows:

> (7) For each tax year beginning on and after January 1, 2013, the personal exemption allowed under subsection (2) shall be adjusted by multiplying the exemption for the tax year beginning in 2012 by a fraction, the numerator of which is the United States consumer price index for the state fiscal year ending in the tax year prior to the tax year for which the adjustment is being made and the denominator of which is the United States consumer price index for the 2010-2011 state fiscal year. The resultant product shall be rounded to the nearest $100.00 increment. As used in this section, "United States consumer price index" means the United States consumer price index for all urban consumers as defined and reported by the United States department of labor, bureau of labor statistics. For each tax year, the exemptions allowed under subsection (3) shall be adjusted by multiplying the exemption amount under subsection (3) for the tax year by a fraction, the numerator of which is the United States consumer price index for the state fiscal year ending the tax year prior to the tax year for which the adjustment is being made and the denominator of which is the United States consumer price index for the 1998-1999 state fiscal year. The resultant product shall be rounded to the nearest $100.00 increment. ~~For a taxpayer whose total household resources~~

~~are $75,000.00 or more for a single return or $150,000.00 or more for a joint return, the personal exemption allowed under subsection (2) shall be adjusted by multiplying the exemption for the tax year for a single return by a fraction, the numerator of which is $100,000.00 minus the taxpayer's total household resources, and the denominator of which is $25,000.00, and for a joint return by a fraction, the numerator of which is $200,000.00 minus the taxpayer's total household resources, and the denominator of which is $50,000.00. The personal exemption allowed under subsection (2) shall not be allowed for a single taxpayer whose total household resources exceed $100,000.00 or for joint filers whose total household resources exceed $200,000.00.~~

* * *

(9) In determining taxable income under this section, the following limitations and restrictions apply:

(a) For a person born before 1946, this subsection provides no additional restrictions or limitations under subsection (1)(f).

(b) For a person born in 1946 through 1952, the sum of the deductions under subsection (1)(f)(*i*), (*ii*), and (*iv*) is limited to $20,000.00 for a single return and $40,000.00 for a joint return. After that person reaches the age of 67, the deductions under subsection (1)(f)(*i*), (*ii*), and (*iv*) do not apply and that person is eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return, which deduction is available against all types of income and is not restricted to income from retirement or pension benefits. ~~However if that person's total household resources exceed $75,000.00 for a single return or $150,000.00 for a joint return, that person is not eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return.~~ A person that takes the deduction under subsection (1)(e) is not eligible for the unrestricted deduction of $20,000.00 for a single return and $40,000.00 for a joint return under this subdivision.

(c) For a person born after 1952, the deduction under subsection (1)(f)(*i*), (*ii*), or (*iv*) does not apply. When that

person reaches the age of 67, that person is eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return, which deduction is available against all types of income and is not restricted to income from retirement or pension benefits. If a person takes the deduction of $20,000.00 for a single return and $40,000.00 for a joint return, that person shall not take the deduction under subsection (1)(f)(*iii*) and shall not take the personal exemption under subsection (2). That person may elect not to take the deduction of $20,000.00 for a single return and $40,000.00 for a joint return and elect to take the deduction under subsection (1)(f)(*iii*) and the personal exemption under subsection (2) if that election would reduce that person's tax liability. ~~However, if that person's total household resources exceed $75,000.00 for a single return or $150,000.00 for a joint return, that person is not eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return.~~ A person that takes the deduction under subsection (1)(e) is not eligible for the unrestricted deduction of $20,000.00 for a single return and $40,000.00 for a joint return under this subdivision.

(d) For a joint return, the limitations and restrictions in this subsection shall be applied based on the age of the older spouse filing the joint return.

If the Legislature disagrees with this Court's determination that what remains in 2011 PA 38 after severance is "operable" pursuant to MCL 8.5, or believes that this determination is otherwise inconsistent with its intent, the Legislature is, of course, free to modify MCL 206.30 as it sees fit, subject only to the constraints of the state and federal constitutions.[56]

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[56] Although Justice HATHAWAY agrees that those portions of the statutes that we sever must be struck down because they are unconstitutional, she nevertheless accuses us of "redraft[ing] a section of this act to provide tax deductions and exemptions that the Legislature clearly did not intend." *Post* at 363. Obviously, the Legislature *intended* to include these sections, else this Court would not now be confronted with the question of their constitutionality. However, *whenever* the Legislature

IV. CONCLUSION

For all of these reasons, we hold that:

• Reducing or eliminating the statutory exemption for public-pension incomes as set forth in

enacts legislation that this Court deems unconstitutional, it is our responsibility to rectify that unconstitutionality, notwithstanding the Legislature's intent. The next question for any Court confronted with such a situation is to determine whether the unconstitutional language can be severed from the rest of the act without undermining the act, and in this regard, the Legislature's intent *is* controlling. And for the reasons discussed earlier, we believe that striking down only those portions of the act that are unconstitutional, rather than striking down entire sections, is more consistent with the Legislature's intentions. Contrary to Justice HATHAWAY's contention, we are in no way "assert[ing] that members of the Legislature would have known which words from each section it passed could be held unconstitutional." *Post* at 377. Obviously, we must, and do, assume that when the Legislature passed this act, it believed that the *entire* act was constitutional, or it would not have enacted it. However, because we reach a different conclusion, we must remediate what is unconstitutional. And by enacting MCL 8.5, the Legislature has informed us that when we sever unconstitutional language, this Court should leave intact all other language, as long as that language is "operable" and not "inconsistent with the manifest intent of the legislature." In light of our analysis of the purposes of the act, and the statements at oral argument of the lawyer representing the position of the Legislature and the Governor, we believe that we have reached the correct severance determination under MCL 8.5. If the intent of the Legislature is more truly in accord with the analysis of Justice HATHAWAY's opinion than with that of this opinion, the Legislature is, of course, free to act on its own to conform with that intent.

Further, in asserting as Justice HATHAWAY does that this Court should strike down the deduction and exemption sections in their entirety, we conclude that, just as the Legislature did not "intend" that this Court strike down the limited portions of the law that the Court determines to be unconstitutional, the Legislature also did not "intend" that the *entirety* of these sections be struck down. Moreover, if we were to strike down these entire sections, and return the law to its status before 2011 PA 38 was passed, deductions and exemptions would *still* apply to those taxpayers earning $75,000 or more, just as they did before the enactment of the law. Thus, at least in this respect, Justice HATHAWAY's proposed remedy is no different from ours: both would allow taxpayers earning $75,000 or more to receive these deductions and exemptions.

MCL 206.30 *does not* impair accrued financial benefits of a "pension plan [or] retirement system of the state [or] its political subdivisions" under Const 1963, art 9, § 24; and

• Reducing or eliminating the statutory tax exemption for pension incomes as set forth in MCL 206.30 *does not* impair a contractual obligation in violation of Const 1963, art 1, § 10 or US Const, art I, § 10(1).

And we unanimously hold that:

• Determining eligibility for income-tax exemptions on the basis of date of birth as set forth in MCL 206.30(9) *does not* violate the equal protection of the law under Const 1963, art 1, § 2 or the Fourteenth Amendment of the United States Constitution; and

• Determining eligibility for income-tax exemptions and deductions on the basis of total household resources as set forth in MCL 206.30(7) and (9) *does* create a graduated income tax in violation of Const 1963, art 9, § 7.

Finally, we hold that:

• Pursuant to MCL 8.5, the unconstitutional portions of 2011 PA 38 can reasonably be severed from the remainder of the act, which is constitutional with respect to all the issues raised.

Although Justice HATHAWAY agrees that those portions of the statutes that we sever ought to be struck down because they are unconstitutional, she nevertheless asserts that we are "judicially creating tax deductions and exemptions for individuals earning more than $75,000 annually . . . ." *Post* at 363. This is an odd assertion, given that she too would "create tax deductions and exemptions for individuals earning more than $75,000" by striking down the amendments of these

provisions in their entirety and thereby returning the law to its pre-2011 PA 38 status, in which taxpayers earning more than $75,000 received these same deductions and exemptions.

We reemphasize that the questions before us are all constitutional questions. This Court is not deciding whether 2011 PA 38 represents wise or unwise, prudent or imprudent, public policy, only whether 2011 PA 38 is consistent with the constitutions of the United States and Michigan.

YOUNG, C.J., and MARY BETH KELLY and ZAHRA, JJ., concurred with MARKMAN, J.

CAVANAGH, J. (*concurring in part and dissenting in part*). I concur in result only with part III(C) of the majority opinion because I do not believe 2011 PA 38 offends either the state or federal guarantees of equal protection under the law. Additionally, I concur in result only with part III(D) of the majority opinion because I agree that 2011 PA 38 violates the prohibition against a graduated income tax under Const 1963, art 9, § 7. However, I respectfully dissent from part III(A) of the majority opinion because, in my view, 2011 PA 38 violates Const 1963, art 9, § 24 as to those pension benefits that will have accrued before January 1, 2012, when 2011 PA 38 goes into effect. I would hold that the right to the statutory tax exemptions provided by the former MCL 206.30(1)(f) and similar statutes is an accrued financial benefit that attaches to the pension benefits at the time they accrue and that the right to the deferred exemption is therefore a contractual obligation that may not be diminished or impaired. See Const 1963, art 9, § 24. As applied to any pension benefits that accrue after January 1, 2012, however, I do not believe that 2011 PA 38 would violate Const 1963, art 9, § 24.

I. ACCRUED FINANCIAL BENEFITS

The first sentence of Const 1963, art 9, § 24 provides that "[t]he accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." Therefore, the critical question is whether the tax exemption contained in the preamendment version of MCL 206.30(1)(f) constitutes an accrued financial benefit of a public pension plan or retirement system. If the answer is affirmative, then the tax exemption is a contractual obligation that may not be diminished or impaired.

I believe that the ratifiers of the 1963 Constitution intended the term "accrued financial benefit[]" to encompass statutory tax exemptions for public pensions. Rather than choosing a precisely limited term—such as "monetary payment" or "cash distribution"—the framers chose to include in article 9, § 24 the broader, generalized term "financial benefits." In *Musselman v Governor*, 448 Mich 503, 514; 533 NW2d 237 (1995), this Court explained that a general rule is broader than "a set of specific commands" and that a general rule "governs possibilities that could not have been anticipated at the time." Given that a general rule is intended to encompass possibilities that may not yet exist, the term "accrued financial benefits" is certainly broad enough to encompass statutory tax exemptions, some of which already existed when the 1963 Constitution was ratified.[1]

[1] Because the framers chose a broad, generalized term, I find irrelevant the majority opinion's assertion that there is some import to the constitutional silence regarding whether pension benefits can be taxed. Simply put, the term "financial benefit" is intentionally

Indeed, Michigan has a long history of exempting public pensions from taxation. Annuity payments to employees in city library employees' retirement systems have been exempt from all state, county, township, city, village, and school district taxes since the 1920s, and state employee pensions have been similarly exempt since 1943 under the State Employees' Retirement Act (SERA). See MCL 38.705; MCL 38.40. Because these public-pension exemptions were firmly in place long before the 1963 Constitution was ratified, the financial benefits they provided to covered employees would certainly have been known to the framers and the ratifiers. In 1969, the Legislature enacted 1969 PA 332, which amended § 30 of the Income Tax Act, MCL 206.30, and extended the state's longstanding tax exemptions to the benefits received from all public pension and retirement systems. See MCL 206.30(1)(f), as amended by 2009 PA 134.[2] Extending the tax exemption to all public employees provided an incentive that would attract much-needed professionals to critical jobs in public employment and partially compensated retirees for the comparatively lower compensation received during their years of service to the state. With this history

broad enough to encompass far more than the monetary payments due to retirees at the time of distribution.

[2] Before the enactment of 2011 PA 38, MCL 206.30(1)(f) provided that the following were to be deducted from the adjusted gross income when computing state income taxes:

> (*i*) Retirement or pension benefits received from a federal public retirement system or from a public retirement system of or created by this state or a political subdivision of this state.
>
> (*ii*) Retirement or pension benefits received from a public retirement system of or created by another state or any of its political subdivisions if the income tax laws of the other state permit a similar deduction or exemption or a reciprocal deduction or exemption of a retirement or pension benefit received from a public retirement system of or created by this state or any of the political subdivisions of this state.

in mind, I believe that the statutory tax exemptions for public pensions are well within the types of benefits to which the ratifiers intended to extend contractual protections.

Concluding that the right to the tax exemption at distribution is both a "financial benefit" and an "accrued benefit" is consistent with this historical background. Specifically, there is no dispute that the various tax exemptions for public pensions provide a financial benefit because they result in a greater net monetary payment to retirees. There is likewise no dispute that taxing pension benefits diminishes those payments because removing the exemption will result in a reduced net monetary payment to retirees.

Turning to the phrase "accrued benefit," the majority relies in large part on the definition in *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642; 698 NW2d 350 (2005), to hold that "[a] pension-tax exemption is not an 'accrued' benefit because it does not 'grow over time.' " *Ante* at 314-315, quoting *Studier*, 472 Mich at 654. In holding that health-care benefits were not accrued financial benefits, the *Studier* majority concluded that the "ratifiers of our Constitution would have commonly understood 'accrued' benefits to be benefits of the type that increase or grow over time—such as a pension payment or retirement allowance that increases in amount along with the number of years of service a public school employee has completed." *Studier*, 472 Mich at 654.

Although I do not take issue with the majority's recitation of the various dictionary definitions of "accrue," I do not see how these definitions mandate that the benefit must "increase or grow over time." *Id*. Indeed, not all the definitions the majority provides encompass the idea of accumulation over time. For

example, the quoted definitions of "accrue" include "to come into existence as an enforceable claim," "to vest as a right," and "to become a present and enforceable right or demand." *Ante* at 313-314 (citations and quotation marks omitted). None of these definitions requires accumulation over time. Instead, these definitions acknowledge that a right can accrue immediately.[3]

As I stated in my *Studier* dissent, "[t]he term 'accrued financial benefits' was meant to include benefits that an employee *had worked in reliance on and continued to work in reliance on*." *Studier*, 472 Mich at 676 (CAVANAGH, J., dissenting). Like the health-care benefits at issue in *Studier*, I believe that our public employees have "worked in reliance on and continued to work in reliance on" Michigan's contractual promise that their pension benefits—once accrued—would not be taxed by the state at the time of distribution. Given Michigan's longstanding exemptions for state employees and city librarians, I believe that this interpretation is well within the common understanding of the people at the time of ratification. See *Goldstone v Bloomfield Twp Pub Library*, 479 Mich 554, 570-571; 737 NW2d 476 (2007) (CAVANAGH, J., dissenting).

Regardless, I believe that the tax exemption for public pensions fits even the *Studier* majority's narrow interpretation of "accrued benefit," because the finan-

[3] For example, if one deposits $100 into a bank account, the right to withdraw the $100 "accrues" or "vest[s] as a right" immediately, regardless of whether additional money is deposited into the account. The customer has an immediate, enforceable claim to withdraw the money. The only conditions imposed are those contained in the contract between the bank and the customer. Thus, if one deposits $100 into an account under the contractual promise that if the customer waits 10 years, the customer will be entitled to withdraw $150—free of any additional costs or fees—then the right to withdraw that amount in 10 years vests at the point of the original deposit.

cial benefit provided by what is essentially a deferred tax exemption *does* "increase or grow over time." Specifically, the increase in the value of the tax exemption correlates precisely to the increase in the value of the employee's retirement account. As the value of an employee's retirement account grows over time, so too does the amount of money that will be exempt from taxation upon distribution, resulting in a financial benefit that increases with one's length of service to the public employer. Thus, I believe that the tax exemptions at issue here fit even the *Studier* majority's narrow definition.

In my view, the financial benefits of a pension plan—including any right to a tax exemption at distribution—accrue as an employee performs work for the public employer. See comments of Delegate Richard Van Dusen, 1 Official Record, Constitutional Convention 1961, p 771) ("And with respect to work performed, it is the opinion of the committee that the public employee should have a contractual right to benefits of the pension plan, which should not be diminished by the employing unit after the service has been performed."); *Advisory Opinion re Constitutionality of 1972 PA 258*, 389 Mich 659, 663; 209 NW2d 200 (1973) (holding that "the Legislature cannot diminish or impair accrued financial benefits, but we think it may properly attach new conditions for earning financial benefits which have not yet accrued"). And because prior to January 1, 2012, the financial benefits of public pension plans accrued under a statutory framework that exempted those benefits from taxation at distribution, I believe that the right to the tax exemption attaches to the benefits themselves—as they are earned—and accrues simultaneously.

Thus, while I agree that one generally cannot have any vested right in the continuation of any tax law, *Detroit v Walker*, 445 Mich 682, 703; 520 NW2d 135 (1994), this is not true if the Constitution provides otherwise, see *Shivel v Kent Co Treasurer*, 295 Mich 10, 15; 294 NW 78 (1940). I believe that article 9, § 24 provides otherwise. As I have explained, the Legislature is free to amend the tax exemptions, and indeed has seen fit to do so with 2011 PA 38 and similar acts. Accordingly, because article 9, § 24 protects the pension benefits that have already accrued from diminishment or impairment, and because I believe that the right to the tax exemption at distribution is essentially a deferred tax exemption that accrues simultaneously with the benefits themselves, I do not believe it is constitutional for the state to tax any pension benefits that will have accrued before January 1, 2012.

In contrast to the majority, I do not perceive any conflict with Const 1963, art 9, § 2, which provides that "[t]he *power of taxation* shall never be surrendered, suspended or contracted away." (Emphasis added.) The key phrase in article 9, § 2 is "power of taxation," which is a far different concept from actual taxation. In *W A Foote Mem Hosp, Inc v City of Jackson Hosp Auth*, 390 Mich 193; 211 NW2d 649 (1973), this Court concluded that article 9, § 2 was not violated when the Legislature chose to grant a tax exemption. *Id.* at 214-215. This Court held that rather than surrendering its power of taxation by granting the exemption, the Legislature was affirmatively exercising its taxation power and discretion. *Id*. at 215. Likewise, in enacting MCL 206.30(1)(f), the Legislature again exercised its discretion by creating a tax exemption, but did not forever surrender its power to tax. The import of article 9, § 2, of course, is that the Legislature can repeal or amend the tax exemption created by MCL 206.30(1)(f), as it

has chosen to do in 2011 PA 38. And while the Legislature may properly tax any pension benefits that accrue after January 1, 2012, when 2011 PA 38 goes into effect, in my view, article 9, § 24 protects from taxation any pension benefits that will have already accrued.

I also find it unavailing for the majority to argue that the second sentence of article 9, § 24 supports the majority's conclusion that § 24 was never meant to include a tax exemption because a tax exemption cannot be funded yearly. As the convention comments indicate, the second sentence of § 24 was intended to ensure the annual funding of pension liabilities. See 2 Constitutional Convention 1961, Official Record, p 2659. A tax exemption is not a liability. A tax exemption does not represent money the state must pay out; it only limits what the state may take in. Offering a tax exemption as a financial benefit for its employees allows the state to attract and retain talented and dedicated employees without incurring any yearly funding obligation for the benefit given. Therefore, the second sentence of § 24 is irrelevant to whether a tax exemption is encompassed within the meaning of "accrued financial benefits."[4]

In addition, it is well established that "an advisory opinion does not constitute a decision of the Court and is not precedentially binding in the same sense as a

[4] The majority opinion's claim that my analysis proves inconsistent is premised on the majority's tautological assumption that *only* those benefits that are capable of being funded annually qualify as accrued financial benefits under article 9, § 24. The correctness of the majority's accusation of inconsistency rests on its conclusion that the second sentence of article 9, § 24 is indispensible to the definition of "accrued financial benefits." The majority obfuscates my point, however, which is that the second sentence of article 9, § 24 is irrelevant to tax exemptions because, while a tax exemption *is* an accrued financial benefit, it is not a liability that can be funded annually.

decision of the Court after a hearing on the merits." *Advisory Opinion re Constitutionality of 1972 PA 294*, 389 Mich 441, 461 n 1; 208 NW2d 469 (1973). With this premise in mind, I believe the majority opinion sweeps far too wide in attempting to foreclose the myriad possible challenges premised on individual factual circumstances. For example, how does the removal of the tax exemption affect collective-bargaining agreements, in which the rate of future pension benefits was calculated, at least in part, in reliance on Michigan's longstanding exemption for pension benefits? As Justice LEVIN cautioned in a previous advisory opinion, "[w]hen a court holds an act to be constitutional it does no more than deny a particular claim of unconstitutionality. It ought not, by premature expressions on generalized abstract claims, to appear to foreclose persons differently situated from advancing more concrete claims of unconstitutionality." *Id*. at 484 (LEVIN, J., concurring). Footnote 9 of the majority opinion does just that: it attempts to foreclose differently situated persons from advancing concrete claims, and it does so with "premature expressions on generalized abstract claims."

Likewise, I believe the majority opinion reaches too far by attempting to foreclose future challenges to the Legislature's revocations of the individual exemptions contained in SERA, MCL 38.40(1); the Public School Employees Retirement Act, MCL 38.1346(1); the Michigan Legislative Retirement System Act, MCL 38.1057(1); the city library employees' retirement system act, MCL 38.705; and the Judges Retirement Act, MCL 38.2670(1).[5] In my view, the existence of these

[5] All these provisions have been amended to remove the exemptions, beginning January 1, 2012. See Public Acts 41 through 45 of 2011. Notably, the Governor did not request that this Court review the constitutionality of these other statutory amendments. Nevertheless, my view that the statutory tax exemption within the Income Tax Act creates

specific tax exemptions for public employees within the individual retirement acts themselves creates a strong argument that, under article 9, § 24, the exemptions are part of "each pension plan [or] retirement system," independent of the Income Tax Act.[6]

I think it important to emphasize that until the current fiscal crisis, the state of Michigan was perfectly

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accrued financial benefits for purposes of article 9, § 24 applies equally to the tax exemptions found within these retirement acts.

[6] For example, before the amendments contained in 2011 PA 41, § 40 of SERA provided in relevant part:

> The right of a person to a pension, an annuity, a retirement allowance, any optional benefit, *any other right accrued or accruing to any person under the provisions of this act*, the various funds created by this act, and all money and investments and income of the funds, are exempt from any state, county, municipal, or other local tax. [MCL 38.40(1), as amended by 2002 PA 99 (emphasis added).]

In my view, there is a strong argument that the tax exemption provided by SERA is an inherent part of the deferred compensation embodied in pension plan. Nevertheless, given my belief that the tax exemptions are "contractual obligations" under Const 1963, art 9, § 24, it is not necessary to opine on whether the tax exemption statutes found within the individual retirement acts—such as the tax exemption previously found within SERA—create contractual obligations for purposes of the Contracts Clause, as have other jurisdictions. See, e.g., *Hughes v Oregon*, 314 Or 1, 21 n 27; 838 P2d 1018 (1992). Further, because I conclude that 2011 PA 38 violates article 9, § 24 of the Constitution, I do not find it necessary to conclusively opine on whether the statutory amendments also violate the Contracts Clauses of the Michigan and United States Constitutions. Nevertheless, it briefly bears mentioning that there is an arguable Contracts Clause violation in this case. Because I believe that the statutory tax exemptions are accrued financial benefits under article 9, § 24, these benefits are "contractual obligations" that implicate the Contracts Clauses. Accordingly, under the framework for Contracts Clause analyses set forth in *Romein v Gen Motors Corp*, 436 Mich 515, 534-536; 462 NW2d 555 (1990), it is arguable that the modifications of the tax exemption statutes will amount to a substantial impairment of that contractual right. See *Bailey v North Carolina*, 348 NC 130, 151; 500 SE2d 54 (1998). Finally, even if there is a legitimate purpose behind the statutory amendments, I question whether violating article 9, § 24 of the Constitution is a reasonable means of carrying out that purpose.

content to receive the reciprocal benefits of the promise made to its prospective and current employees that, should they continue in service to the state long enough to be eligible for retirement, they would be rewarded with a tax exemption for the retirement benefits they had earned. Only now do our state employees and retirees learn that their reliance on Michigan's promise was unfounded, and today's majority decision affixes a judicial stamp of approval to the revocation of that promise. Between MCL 206.30(1)(f) and article 9, § 24, the state of Michigan entered into a contract with its employees, promising that in return for their years of service, their pensions would not be taxed. Promises must be kept.

I, therefore, respectfully dissent from the majority's decision because I believe that Const 1963, art 9, § 24, requires the state to keep its promise. I would hold that 2011 PA 38 is unconstitutional as applied to any pension benefits that will have accrued before January 1, 2012.

II. CONCLUSION

I respectfully dissent from the majority's conclusion that 2011 PA 38 does not violate Const 1963, art 9, § 24. In my view, removing the tax exemptions formerly provided by MCL 206.30(1)(f) and similar statutes violates article 9, § 24, but only as applied to any public-pension benefits that will have accrued before January 1, 2012, when the new law goes into effect. As to pension benefits that accrue after January 1, 2012, taxation of those benefits must be limited as stated in part III(D) of the majority opinion, because I agree with the majority that 2011 PA 38 violates the prohibition against a graduated income tax under Const 1963, art 9, § 7.

MARILYN KELLY, J., concurred with CAVANAGH, J.

HATHAWAY, J. (*dissenting*). I dissent from the majority's decision in this matter because the majority allows unconstitutional limitations on retirement-based income-tax deductions to remain in place and engages in policymaking decisions that should properly be left to the Legislature and the Governor. The majority not only fails to strike down provisions of 2011 PA 38[1] that are clearly unconstitutional, but also redrafts a section of this act to provide tax deductions and exemptions that the Legislature clearly did not intend. I would hold that the restrictions on the deductions of retirement income, as well as the income-based restrictions on personal exemptions, enacted by 2011 PA 38 are unconstitutional. The restrictions on deductions of retirement benefits contained in § 30(9) of the Income Tax Act, MCL 206.30(9), as amended by 2011 PA 38, clearly violate article 9, § 24; article 1, § 10; and article 9, § 7 of Michigan's Constitution. The income-based restrictions on personal exemptions contained in § 30(7) of that act, as amended by 2011 PA 38, clearly violate article 9, § 7 of the Michigan Constitution. Moreover, I would follow the established rules of statutory construction and refrain from judicially creating tax deductions and exemptions for individuals earning more than $75,000 annually and couples earning more than $150,000 annually, which the Legislature clearly did not intend.[2] I

[1] Section 30(9) of the Income Tax Act, as amended by 2011 PA 38, is focused on "deductions" against retirees' income. Section 30(7) is focused on "exemptions" with regard to the income of all taxpayers who qualify for the personal exemption under § 30(2).

[2] It is clear from the language of 2011 PA 38 that the Legislature did not intend to extend deductions or exemptions to individuals and couples with higher incomes. The Legislature specifically did not extend the deductions at issue to individuals earning more than $75,000 and couples

would leave to the Legislature the important role of deciding the best tax policy for the citizens of this state and limit the judiciary to its proper role of reviewing statutes to determine whether they are in accordance with our Constitution. Because the majority usurps this important legislative function in its decision today, I dissent.

I. ANALYSIS

On May 25, 2011, the Governor of Michigan signed 2011 PA 38 into law. Among the various changes to the tax code enacted in 2011 PA 38 is a sliding scale for limitations on deductions of retirement income based on age and income level. The act also imposes a sliding scale for limitations on income exemptions based on income level. Opponents of the act argue that these changes violate the United States and Michigan Constitutions, while supporters of the act contend that its provisions are consistent with the Legislature's power to tax.

On May 31, 2011, the Governor asked this Court to render an advisory opinion on issues pertaining to whether certain provisions of 2011 PA 38 are constitutional.[3] The specific inquiries raised by the Governor

earning more than $150,000 annually. The Legislature similarly limited personal exemptions for individuals earning between $75,000 and $100,000 and for couples earning between $150,000 and $200,000. Further, the Legislature specifically prohibited individuals earning more than $100,000 and couples earning more than $200,000 from claiming any personal exemptions. Despite this legislative intent, the majority provides such deductions and exemptions.

[3] At the time the Governor asked this Court for an advisory opinion, 2011 PA 38 was still referred to by its public act number. It went into effect on October 1, 2011, and the provisions of 2011 PA 38 are now referred to by their statutory numbers, e.g., MCL 206.30. Accordingly, I will refer to the provisions at issue by their statutory numbers in the remainder of this opinion. Unless otherwise noted, all references to those statutes are to the amended versions.

were (1) whether reducing or eliminating the statutory exemption for public-pension incomes as described in MCL 206.30, as amended, impairs accrued financial benefits of a "pension plan [or] retirement system of the state [or] its political subdivisions" under Const 1963, art 9, § 24; (2) whether reducing or eliminating the statutory tax exemption for pension incomes as described in MCL 206.30, as amended, impairs a contractual obligation in violation of Const 1963, art 1, § 10 or US Const, art I, § 10(1); (3) whether determining eligibility for income-tax exemptions on the basis of total household resources, or age and total household resources as described in MCL 206.30(7) and (9), as amended, creates a graduated income tax in violation of Const 1963, art 9, § 7; and (4) whether determining eligibility for income-tax exemptions on the basis of date of birth as described in MCL 206.30(9), as amended, violates equal protection of the law under Const 1963, art 1, § 2 or the Fourteenth Amendment of the United States Constitution.[4]

This Court agreed to hear oral argument on the Governor's questions and requested that the Attorney General provide briefing in support of and in opposition to the constitutionality of the statutory sections at issue. *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 489 Mich 954 (2011).

A. MCL 206.30(9) VIOLATES ARTICLE 9, § 24 OF THE MICHIGAN CONSTITUTION

The first issue is whether reducing or eliminating the statutory deduction for public-pension income as de-

[4] As to the fourth question posed by the Governor, I am not persuaded that the provision of the act basing tax liability on age violates equal-protection guarantees. However, because I conclude that the provision is unconstitutional for other reasons, I will not address the equal-protection issue in detail in this opinion.

scribed in MCL 206.30 impairs accrued financial benefits of a "pension plan [or] retirement system of the state [or] its political subdivisions" under Const 1963, art 9, § 24. I conclude that it clearly does.

The starting point for this analysis is the language of article 9, § 24, which protects accrued retirement benefits of public employees.[5] Const 1963, art 9, § 24 provides, in part: "The accrued financial benefits of each pension plan and retirement system of the state and its political subdivisions shall be a contractual obligation thereof which shall not be diminished or impaired thereby." Pursuant to this constitutional provision, accrued financial benefits of public-pension and retirement systems *shall not be diminished or impaired*. This constitutional provision was ratified by the citizens of the state of Michigan and represents the will of the voters. Article 9, § 24 is not discretionary; it is a mandatory provision of our state Constitution that the Legislature is bound to follow. Moreover, the judiciary is bound to abide by this provision in determining whether a legislative enactment withstands constitutional scrutiny.

Before the enactment of the current version of MCL 206.30,[6] the prior version of MCL

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[5] See *Tyler v Livonia Pub Sch*, 459 Mich 382, 396; 590 NW2d 560 (1999).

[6] The current version of MCL 206.30(1)(f) provides in pertinent part:

> Deduct the following to the extent included in adjusted gross income subject to the limitations and restrictions set forth in [MCL 206.30(9)]:
>
> (*i*) Retirement or pension benefits received from a federal public retirement system or from a public retirement system of or created by this state or a political subdivision of this state.
>
> (*ii*) Retirement or pension benefits received from a public retirement system of or created by another state or any of its

206.30(1)(f)(*i*)[7] unequivocally provided that public pensions are not subject to state income tax. At issue is whether MCL 206.30(9), which now abrogates the protection of public-pension benefits for individuals born in or after 1946[8] and imposes a tax on payments of public-pension benefits, is consistent with the Constitution. Subsection (9) provides:

> political subdivisions if the income tax laws of the other state permit a similar deduction or exemption or a reciprocal deduction or exemption of a retirement or pension benefit received from a public retirement system of or created by this state or any of the political subdivisions of this state.
>
> * * *
>
> (*iv*) Beginning on and after January 1, 2007, retirement or pension benefits not deductible under [MCL 206.30(1)(f)(*i*)] or [MCL 206.30(1)(e)] from any other retirement or pension system or benefits from a retirement annuity policy in which payments are made for life to a senior citizen, to a maximum of $42,240.00 for a single return and $84,480.00 for a joint return. The maximum amounts allowed under this subparagraph shall be reduced by the amount of the deduction for retirement or pension benefits claimed under [MCL 206.30(1)(f)(*i*)] or [MCL 206.30(1)(e)] and by the amount of a deduction claimed under subdivision [MCL 206.30(1)(p)]. For the 2008 tax year and each tax year after 2008, the maximum amounts allowed under this subparagraph shall be adjusted by the percentage increase in the United States consumer price index for the immediately preceding calendar year. The department shall annualize the amounts provided in this subparagraph as necessary. As used in this subparagraph, "senior citizen" means that term as defined in [MCL 206.514].

[7] The previous version of MCL 206.30(1)(f)(*i*), as amended by 2009 PA 134, set forth unrestricted deductions for "[r]etirement or pension benefits received from a federal public retirement system or from a public retirement system of or created by this state or a political subdivision of this state."

[8] While this first issue discusses public pensions only, MCL 206.30(9) does not distinguish between private and public pensions. Because I would hold that subsection (9) is unconstitutional, I would conclude that the restrictions contained therein are not applicable to any retiree.

In determining taxable income under this section, the following limitations and restrictions apply:

(a) For a person born before 1946, this subsection provides no additional restrictions or limitations under [MCL 206.30(1)(f)].

(b) For a person born in 1946 through 1952, the sum of the deductions under [MCL 206.30(1)(f)(*i*), (*ii*), and (*iv*)] is limited to $20,000.00 for a single return and $40,000.00 for a joint return. After that person reaches the age of 67, the deductions under [MCL 206.30(1)(f)(*i*), (*ii*), and (*iv*)] do not apply and that person is eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return, which deduction is available against all types of income and is not restricted to income from retirement or pension benefits. However if that person's total household resources exceed $75,000.00 for a single return or $150,000.00 for a joint return, that person is not eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return. A person that takes the deduction under [MCL 206.30(1)(e)] is not eligible for the unrestricted deduction of $20,000.00 for a single return and $40,000.00 for a joint return under this subdivision.

(c) For a person born after 1952, the deduction under [MCL 206.30(1)(f)(*i*), (*ii*), or (*iv*)] does not apply. When that person reaches the age of 67, that person is eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return, which deduction is available against all types of income and is not restricted to income from retirement or pension benefits. If a person takes the deduction of $20,000.00 for a single return and $40,000.00 for a joint return, that person shall not take the deduction under [MCL 206.30(1)(f)(*iii*)] and shall not take the personal exemption under [MCL 206.30(2)]. That person may elect not to take the deduction of $20,000.00 for a single return and $40,000.00 for a joint return and elect to take the deduction under [MCL 206.30(1)(f)(*iii*)] and the personal exemption under [MCL 206.30(2)] if that election would reduce that person's tax liability. However, if that person's total household resources exceed $75,000.00 for a single return or $150,000.00 for a joint return, that person

> is not eligible for a deduction of $20,000.00 for a single return and $40,000.00 for a joint return. A person that takes the deduction under [MCL 206.30(1)(e)] is not eligible for the unrestricted deduction of $20,000.00 for a single return and $40,000.00 for a joint return under this subdivision.
>
> (d) For a joint return, the limitations and restrictions in this subsection shall be applied based on the age of the older spouse filing the joint return. [MCL 206.30(9).]

In reviewing this statute, we must examine the language of the statute itself, and the effect or impact of this new tax on the benefits received by public employees born in or after 1946, to determine whether "accrued financial benefits" are "impaired or diminished." This statute, without question, imposes a new tax on public-employee pensions that did not previously exist. It does so by restricting and limiting the pension and retirement deductions set forth in MCL 206.30(1)(f) on the basis of age and income level. These restrictions and limitations create various degrees of tax liability.

It is undisputed that public-employee pensions and retirement plans are an "accrued financial benefit" for purposes of article 9, § 24. As stated in *Studier v Mich Pub Sch Employees' Retirement Bd*, 472 Mich 642, 654; 698 NW2d 350 (2005), "the ratifiers of our Constitution would have commonly understood 'accrued' benefits to be benefits of the type that increase or grow over time—such as a pension payment or retirement allowance that increases in amount along with the number of years of service [an] employee has completed." Accordingly, MCL 206.30(9) clearly implicates an accrued financial benefit. The inquiry then becomes whether that accrued financial benefit is diminished or impaired by the imposition of a state tax directly on that pension.

In analyzing this issue, the effect or impact the provision will have on public pensions cannot be ig-

nored. MCL 206.30(9) has no impact on public pensions for those persons born before 1946. However, all persons entitled to receive public pensions born in or after 1946 will be directly impacted. These public employees with vested pensions will have their benefits reduced. This is a direct financial impact. For example, before the enactment of MCL 206.30(9), a retiree born after 1952 who earned annual public-pension benefits of $20,000 would receive the full $20,000 annually. Under MCL 206.30(9), however, that retiree's $20,000 pension is no longer deductible. That $20,000 is subject to the state's 4.35 percent income tax rate, which results in an $875 reduction in the total amount of money that the retiree will receive annually. This is a direct tax on a public pension that will in most instances be deducted directly from the pension benefit at the time of distribution. This results in a financial reduction in the benefit to the pension recipient. A financial reduction of a benefit is a diminishment or impairment under any definition.[9] Thus, a direct tax on public pensions contravenes the constitutional prohibition contained in article 9, § 24. Specifically, by diminishing the vested pension and retirement benefits of public employees, MCL 206.30(9) violates the constitutional mandate that such benefits "shall not be diminished."[10]

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[9] "Diminish" is defined as "to make, or make seem, smaller; reduce in size, degree, importance, etc.; lessen," *Webster's New World College Dictionary* (1988), or "to lessen; decrease," *Random House Webster's College Dictionary* (1997). "Impair" is defined as "to make worse, less, weaker, etc.; damage; reduce." *Webster's New World College Dictionary* (1988).

[10] The majority asserts that I do not recognize the distinction between pension benefits and tax deductions. I do recognize that there is a distinction; however, that distinction is not the relevant inquiry in this matter. The relevant inquiry under article 9, § 24 is whether accrued financial benefits are diminished. It is the majority that disregards that

The majority opines that MCL 206.30(9) only reduces or eliminates tax deductions based on retirement and pension benefits and does not directly reduce the benefits themselves. The majority reasons that "tax deductions" do not amount to an accrued financial benefit and, therefore, the deductions do not fall within the purview of article 9, § 24. I find the majority's reasoning unpersuasive and erroneous because it creates an unnecessary distinction. Simply stated, a tax is a tax, whether it comes in the form of a direct tax increase or the elimination of a deduction. The elimination of this tax deduction results in a new tax, which is directly imposed on vested pensions. The pension benefits are irrefutably "accrued financial benefits." The majority disregards this. The majority also disregards the fact that the payout of pension benefits is reduced. But the impact remains the same: pension benefits, which are accrued financial benefits, will be diminished or impaired because they will be directly reduced by this tax. As former Attorney General Frank Kelley correctly stated in an opinion of the Attorney General:

> [T]here is little question that an exemption from taxation for pension benefits constitutes "financial benefits" within the meaning of Const 1963, art 9, § 24, since the exemption usually will result in greater net pension payments for the recipient. In Robert Tilove's treatise, *Public Employee Pension Funds* (1976), *cited with approval* by Justice Williams for the unanimous Court in *Kosa v State Treasurer*, 408 Mich 356, 372 n 22; see also pp 372-373; 292 NW2d 452 (1980), the author, Tilove, in referring to public pension income tax exemptions generally, states: "[a]n income tax exemption has precisely the same effect as a benefit." (At p 244.) [OAG, 1991-1992, No 6697, p 119 (December 18, 1991).]

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reducing or eliminating tax deductions results in the diminishment of pension benefits, which are accrued financial benefits.

The public-pension tax exemptions themselves have become part of the accrued financial benefits for vested employees, and reducing or eliminating them violates the Constitution.[11] Therefore, under article 9, § 24, the Legislature cannot circumvent the prohibition against reducing accrued financial benefits by reducing or eliminating tax deductions unless it replaces the loss of benefits caused by the reduction or elimination of the deductions. The result of cutting the deduction for benefits is the same as directly cutting the benefits themselves, and it is unconstitutional. The Legislature cannot do indirectly what the Constitution directly prohibits.

B. MCL 206.30(9) VIOLATES ARTICLE 1, § 10 OF MICHIGAN'S CONSTITUTION

The next issue is whether reducing or eliminating the statutory deduction for vested public-pension income as described in MCL 206.30 results in a "law impairing the obligation of contract" under article 1, § 10 of the Michigan Constitution. I conclude that it does.

Const 1963, art 9, § 24 specifies that accrued financial benefits of public-retirement and pension plans are constitutionally mandated and protected "contractual obligation[s] . . . ." Const 1963, art 1, § 10 provides that "[n]o bill of attainder, ex post facto law or law impairing the obligation of contract shall be enacted." Stated plainly, article 9, § 24 creates an undiminishable, unimpairable contractual obligation with regard to accrued financial benefits of retirement income, and article 1, § 10 prohibits the Legislature from passing laws that

[11] This is true because the tax exemptions are directly tied to pension income that is vested and is being paid to retirees. If this were a sales tax or some other form of tax not directly tied to a constitutionally protected form of income, we would be faced with different issues.

impair contractual obligations. Therefore, if a statutory provision reduces the constitutionally afforded contractual obligations surrounding accrued financial benefits of retirement income, that statutory provision violates these constitutional provisions.

As explained in the discussion of the previous issue, MCL 206.30(9) reduces the accrued financial benefits of public retirement and pension plans. By reducing the amount of benefits that public employees receive as part of the contractual obligation owed them by public entities, MCL 206.30(9) impairs that contractual obligation. Thus, the reduction of such benefits violates the constitutional protections afforded to contractual obligations and must be struck down.

C. MCL 206.30(7) AND (9) VIOLATE ARTICLE 9, § 7 OF MICHIGAN'S CONSTITUTION

The third issue before us is whether the income-based criteria for determining tax liability in MCL 206.30 create a graduated income tax in violation of article 9, § 7 of Michigan's Constitution. Like the majority, I conclude that they do.

Article 9, § 7 of Michigan's Constitution prohibits a graduated income tax. That provision states: "No income tax graduated as to rate or base shall be imposed by the state or any of its subdivisions." This Court has previously stated that article 9, § 7 was designed to prohibit a graduated income-tax system that is similar to the federal tax system, in which tax rates increase as income increases. *Kuhn v Dep't of Treasury*, 384 Mich 378, 389; 183 NW2d 796 (1971). The income-based criteria contained in sections MCL 206.30(7) and (9),[12] which increase tax liability for higher levels of income,

[12] MCL 206.30(7) provides:

are unconstitutional. Such criteria create a graduated income tax that effectively increases the tax rate on the basis of a taxpayer's income.

The supporters of MCL 206.30 argue that it does not directly create higher tax rates for higher levels of income because the tax rate remains flat at 4.35 percent. The supporters argue that it is irrelevant whether the effective tax rate increases as "household resources"—meaning income—increase, as long as the 4.35 percent tax rate remains intact. However, the

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For each tax year beginning on and after January 1, 2013, the personal exemption allowed under subsection [MCL 206.30(2)] shall be adjusted by multiplying the exemption for the tax year beginning in 2012 by a fraction, the numerator of which is the United States consumer price index for the state fiscal year ending in the tax year prior to the tax year for which the adjustment is being made and the denominator of which is the United States consumer price index for the 2010-2011 state fiscal year. The resultant product shall be rounded to the nearest $100.00 increment. As used in this section, "United States consumer price index" means the United States consumer price index for all urban consumers as defined and reported by the United States department of labor, bureau of labor statistics. For each tax year, the exemptions allowed under [MCL 206.30(3)] shall be adjusted by multiplying the exemption amount under [MCL 206.30(3)] for the tax year by a fraction, the numerator of which is the United States consumer price index for the state fiscal year ending the tax year prior to the tax year for which the adjustment is being made and the denominator of which is the United States consumer price index for the 1998-1999 state fiscal year. The resultant product shall be rounded to the nearest $100.00 increment. For a taxpayer whose total household resources are $75,000.00 or more for a single return or $150,000.00 or more for a joint return, the personal exemption allowed under [MCL 206.30(2)] shall be adjusted by multiplying the exemption for the tax year for a single return by a fraction, the numerator of which is $100,000.00 minus the taxpayer's total household resources, and the denominator of which is $25,000.00, and for a joint return by a fraction, the numerator of which is $200,000.00 minus the taxpayer's total household resources, and the denominator of which is $50,000.00. The personal exemption allowed under [MCL 206.30(2)] shall not be allowed for a single taxpayer whose total household resources exceed $100,000.00 or for joint filers whose total household resources exceed $200,000.00.

argument that MCL 206.30 is constitutional because it does not *directly* do what the Constitution prohibits is unpersuasive. In *Butcher v Dep't of Treasury*, 425 Mich 262, 273; 389 NW2d 412 (1986), this Court stated:

> It is clear that in *Kuhn*, by closely examining the credits, exclusions, and exemptions there challenged, we at least implied that a constitutional violation can occur by the use of income criteria for determining their amounts. The *reduction* of a credit . . . would be no exception to such an implication, if . . . it was determined that such a reduction was influenced by income bracketing, and such factors affected the income tax liability.

While the income-based criteria in MCL 206.30(7) and (9) do not directly increase the tax rate or base proportional to income level, the effect of imposing those criteria is to create a graduated tax rate tied to income level.

For example, consider two single retirees born after 1952 who have reached the age of 67. Retiree A earns $100,000 a year, and Retiree B earns $50,000 a year. Under MCL 206.30(9), Retiree A is not entitled to a $20,000 deduction in taxable income because he or she makes more than $75,000, while Retiree B makes less than $75,000 and is entitled to the deduction. Thus, Retiree B only pays taxes on $30,000 of taxable income. With a tax rate of 4.35 percent on taxable income, Retiree A pays $4,350 in taxes, which is an effective rate of 4.35 percent on $100,000. Meanwhile, Retiree B pays $1,305 in taxes, which is an effective rate of 2.61 percent on $50,000. The result is a graduated tax rate based on level of income. The same calculations produce similar results for the income-based reduction and elimination of personal exemptions for all taxpayers found in MCL 206.30(7). All income-based criteria for

limiting and restricting taxable income using income brackets are unconstitutional.

Accordingly, I would hold that both MCL 206.30(7) and (9) are unconstitutional.

D. THE MAJORITY'S RESOLUTION

The final issue is one created by the majority's perplexing resolution of this case, in light of its holding that MCL 206.30(7) and (9) violate the Constitution. I agree with the majority that the income-based factors in subsections (7) and (9) unconstitutionally create a graduated income tax. However, I disagree with the troubling method that the majority has chosen to resolve the Governor's questions with regard to the constitutionality of those subsections. Rather than striking down those subsections, the majority carves out the sentences from subsections (7) and (9) that limit personal exemptions and deductions on the basis of income.[13] In doing so, the majority has created entirely different laws than those passed by the Legislature and signed by the Governor. Specifically, the majority provides judicially created tax exemptions and deductions, despite the fact that the Legislature did not provide such tax breaks. The majority's decision changes the tax code and now allows individuals earning more than $75,000 annually, and couples earning more than $150,000 annually, to have their tax liability reduced. This is the opposite of what the Legislature intended.

The majority claims that it is simply severing the unconstitutional portions from the statute. However, the statutory rules of severability do not permit such an outcome. Those rules are contained in MCL 8.5, which provides:

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[13] For the majority's new tax policies, see *ante* at 347-349.

> In the construction of the statutes of this state the following rules shall be observed, *unless such construction would be inconsistent with the manifest intent of the legislature*, that is to say:
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> If any portion of an act or the application thereof to any person or circumstances shall be found to be invalid by a court, such invalidity shall not affect the remaining portions or applications of the act which can be given effect without the invalid portion or application, *provided such remaining portions are not determined by the court to be inoperable*, and to this end acts are declared to be severable. [Emphasis added.]

Under these rules, this Court must consider whether an entire section has to be struck down or whether the unconstitutional portions of that section can be severed from the remainder of the statute. Unconstitutional language can be severed when "the remaining portions are not determined by the court to be inoperable . . . ."[14] However, that only applies if the remaining portion of the statute is not "inconsistent with the manifest intent of the legislature . . . ."[15]

In this matter, the majority attempts to justify its result by stating that the Legislature was aware that portions of 2011 PA 38 could be held unconstitutional and that those portions could be severed to keep the rest of the act constitutional. The majority asserts that members of the Legislature would have known which words from each section it passed could be held unconstitutional. This is groundless guesswork by the majority.

Moreover, the majority attempts to justify its restructuring of sections MCL 206.30(7) and (9) by arguing that the Attorney General requested this remedy in the

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[14] MCL 8.5.

[15] *Id*.

brief supporting the law. This argument overlooks a fundamental tenet of statutory analysis: the Court's primary obligation is to ascertain legislative intent.[16] The Legislature duly enacted this statute, and the Governor signed it into law. We have a clear indication of what the Legislature intended when it limited personal exemptions and deductions of retirement income: the actual language of the statute before us.[17] Given the language of MCL 206.30(7) and (9), it is indisputable that the Legislature intended to determine tax liability on the basis of factors such as age and income, and it is also indisputable that the Legislature chose not to grant exemptions and deductions to taxpayers in higher income brackets. Raising or lowering tax liability is a highly political undertaking in this state. The Legislature, for its own policy reasons, chose not to lower the tax liability of individuals earning more than $75,000 annually and couples earning more than $150,000 annually, and it incorporated language into MCL 206.30 to fulfill this intention. While that policy decision was unconstitutional, it is not the place of this Court to make tax policy choices for the Legislature by severing

[16] *People v Hill*, 486 Mich 658, 667; 786 NW2d 601 (2010).

[17] In *Sun Valley Foods Co v Ward*, 460 Mich 230, 236; 596 NW2d 119 (1999), we stated:

> The foremost rule, and our primary task in construing a statute, is to discern and give effect to the intent of the Legislature. *Murphy v Michigan Bell Telephone Co*, 447 Mich 93, 98; 523 NW2d 310 (1994). See also *Nation v W D E Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). This task begins by examining the language of the statute itself. The words of a statute provide "the most reliable evidence of its intent . . . ." *United States v Turkette*, 452 US 576, 593; 101 S Ct 2524; 69 L Ed 2d 246 (1981). If the language of the statute is unambiguous, the Legislature must have intended the meaning clearly expressed, and the statute must be enforced as written. No further judicial construction is required or permitted. *Tryc v Michigan Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996).

parts of the sections at issue. In so doing, the majority expands the exemptions and deductions contemplated by the Legislature. Such a result is clearly against the intent of the Legislature.

In this advisory matter, the Governor asked this Court to opine on whether MCL 206.30(7) and (9) are unconstitutional. Our proper role is to advise the Governor if either of these subsections violates the Constitution. Now that we have done so, it is up to the Legislature to determine whether the Income Tax Act should be redrafted—and, if so, how—in light of our ruling. Accordingly, I would follow the established rules of statutory construction and refrain from judicially creating deductions and exemptions that the Legislature clearly did not intend. I would leave to the Legislature the important role of deciding the best tax policy for the citizens of this state and limit the judiciary to its proper role of reviewing statutes to determine whether they are in accordance with our Constitution.

II. CONCLUSION

I would hold that MCL 206.30(9) is unconstitutional because it clearly violates article 9, § 24; article 1, § 10; and article 9, § 7 of Michigan's Constitution. Furthermore, I would hold that MCL 206.30(7) is unconstitutional because it also clearly violates article 9, § 7 of Michigan's Constitution. The majority not only fails to strike down parts of MCL 206.30 that are clearly unconstitutional, but also redrafts parts of this statute to provide tax exemptions and deductions that the Legislature clearly did not intend.

In sum, I would follow the established rules of statutory construction and refrain from judicially creating deductions and exemptions for individuals earning more than $75,000 annually and couples earning

more than $150,000 annually, which the Legislature clearly did not intend. Moreover, I would leave to the Legislature the important role of deciding the best tax policy for the citizens of this state and properly limit the judiciary's role to reviewing statutes to determine whether they are in accordance with our Constitution. Because the majority usurps this important legislative function in its decision today, I dissent.

FRAZIER v ALLSTATE INSURANCE COMPANY

Docket Nos. 142545 and 142547. Argument on application for leave to appeal October 27, 2011. Decided December 21, 2011.

Mona Lisa Frazier brought an action in the Macomb Circuit Court against her no-fault insurer, Allstate Insurance Company, seeking personal protection insurance benefits under MCL 500.3105(1) for an injury she suffered when she slipped and fell on a patch of ice while closing the passenger door of her parked vehicle. The jury returned a verdict in plaintiff's favor. The court, James M. Biernat Sr., J., denied plaintiff's motion for attorney fees and penalty interest under MCL 500.3148(1). Both parties appealed. After consolidating the appeals, the Court of Appeals, WILDER, P.J. (CAVANAGH, J., concurring, and M. J. KELLY, J., concurring in the result only), affirmed the judgment and reversed the order denying plaintiff attorney fees in an unpublished opinion, issued December 21, 2010 (Docket Nos. 292149 and 293904). The Supreme Court ordered and heard oral argument on whether to grant defendant's application for leave to appeal or take other peremptory action. 489 Mich 955 (2011).

In a memorandum opinion signed by Chief Justice YOUNG and Justices MARKMAN, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

Plaintiff is not entitled to personal protection insurance benefits under the no-fault act because her injury did not arise out of the use of a parked vehicle as a motor vehicle under MCL 500.3106(1). Plaintiff is not entitled to attorney fees under MCL 500.3148(1).

1. An insurer is liable to pay personal protection insurance benefits for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a motor vehicle as a motor vehicle. If the vehicle was parked, this liability does not attach unless specific requirements are met. At issue were the exemptions establishing liability when the injury was a direct result of physical contact with equipment permanently mounted on the vehicle while the equipment was being operated or used or when the person sustained the injury while occupying, entering into, or alighting from the vehicle.

2. The provision that imposes liability for injuries that directly resulted from physical contact with equipment permanently mounted on the vehicle, MCL 500.3106(1)(b), centers on the distinction between "equipment" and "the vehicle." The statutory requirement that the equipment be mounted on the vehicle indicates that the constituent parts of the vehicle are not equipment. Accordingly, insofar as plaintiff was in contact with the door of her vehicle at the time of her injury, she was in contact with the vehicle itself, not with equipment mounted thereon.

3. MCL 500.3106(1)(c) imposes liability for injuries sustained while occupying, entering into, or alighting from a parked vehicle. With respect to the latter, the injury must be sustained "while" alighting, indicating that alighting does not occur in a single moment but occurs as the result of a process. This process begins when a person initiates the descent from a vehicle and is completed when the person has effectively descended from the vehicle and come to rest, that is, when one has successfully transferred full control of one's movement from reliance on the vehicle to one's body. This is typically accomplished when both feet are planted firmly on the ground. In this case, plaintiff had been standing with both feet planted firmly on the ground outside of the vehicle before her injury; she was entirely in control of her body's movement, and she was in no way reliant on the vehicle itself. Therefore, she was not in the process of alighting from the vehicle at the time of her injury; she had already alighted.

4. Because neither exception applied to plaintiff and defendant did not owe her benefits, its refusal to pay them was not unreasonable. Therefore, plaintiff was not entitled to attorney fees under MCL 500.3148(1).

Reversed and remanded for further proceedings.

Justice MARILYN KELLY, joined by Justice CAVANAGH, dissenting, would have denied defendant's application for leave to appeal and affirmed the Court of Appeals' judgment on the ground that the trial court had correctly denied defendant's motion for a directed verdict. A reasonable juror could have concluded that plaintiff was alighting from her vehicle within the meaning of MCL 500.3106(1)(c) when she was injured because she had partly entered her vehicle on the passenger side to place items in it and was completing the act of alighting from it by shutting the door when she fell. She could not have completed the alighting process and moved to the driver's side without closing the passenger door, given that opening or closing a vehicle's door is a function of entering or alighting from the vehicle.

Justice HATHAWAY, dissenting, would have denied defendant's application for leave to appeal because she was not persuaded that the Supreme Court should take further action in this unique, fact-specific case that should have no precedential value.

1. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — PARKED VEHICLES — WORDS AND PHRASES — EQUIPMENT.

An insurer may be required to pay personal protection insurance benefits under the no-fault act for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if the injury was a direct result of physical contact with equipment permanently mounted on the vehicle while the equipment was being operated or used; the constituent parts of a vehicle itself, such as the doors, are not equipment for purposes of this provision (MCL 500.3106[1][b]).

2. INSURANCE — NO-FAULT — PERSONAL PROTECTION INSURANCE BENEFITS — PARKED VEHICLES — WORDS AND PHRASES — ALIGHTING.

An insurer may be required to pay personal protection insurance benefits under the no-fault act for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if the person sustained the injury while occupying, entering into, or alighting from the vehicle; alighting does not occur in a single moment but occurs as the result of a process that begins when a person initiates the descent from a vehicle and is completed when the person has effectively descended from the vehicle and come to rest, that is, when one has successfully transferred full control of one's movement from reliance on the vehicle to one's body; alighting is typically accomplished when both feet are planted firmly on the ground (MCL 500.3106[1][c]).

Mark Granzotto, P.C. (by *Mark Granzotto*), and *Law Offices of Samuel Bernstein* (by *Michael A. Weisserman* and *Mark J. Bernstein*) for plaintiff.

Magdich & Associates, PC (by *Karen W. Magdich*), for defendant.

MEMORANDUM OPINION. At issue is whether defendant insurer is liable to plaintiff for personal protection insurance benefits under the no-fault act, MCL

500.3101 *et seq*. MCL 500.3105(1) sets forth the parameters of personal protection insurance coverage. It provides:

> Under personal protection insurance an insurer is liable to pay benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle, subject to the provisions of this chapter. [MCL 500.3105(1).]

The next section of the act, MCL 500.3106, explains when such liability attaches in the case of a parked vehicle:

> Accidental bodily injury does not arise out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle unless any of the following occur:
>
> * * *
>
> (b) . . . [T]he injury was a direct result of physical contact with equipment permanently mounted on the vehicle, while the equipment was being operated or used . . . .
>
> (c) . . . [T]he injury was sustained by a person while occupying, entering into, or alighting from the vehicle. [MCL 500.3106(1).]

MCL 500.3106(1) expressly delineates when "accidental bodily injury aris[es] out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle" if the vehicle is parked. Therefore, in the case of a parked motor vehicle, a claimant must demonstrate that his or her injury meets one of the requirements of MCL 500.3106(1) because unless one of those requirements is met, the injury does not arise out of the use of a vehicle as a motor vehicle, under MCL 500.3105(1). The question here is whether plaintiff qualifies under the exceptions found in MCL 500.3106(1)(b) or (c).

MCL 500.3106(1)(b) centers on the distinction be-

tween "equipment" and "the vehicle." "Equipment" is defined as "the articles, implements, etc., used or needed for a specific purpose or activity," while "vehicle" is defined as "any means in or by which someone or something is carried or conveyed: *a motor vehicle*" or "a conveyance moving on wheels, runners, or the like, as an automobile." *Random House Webster's College Dictionary* (1997). Because all functioning vehicles must be composed of constituent parts, no single article constitutes "the vehicle." This reality creates the potential for the definition of "equipment" to engulf that of "the vehicle." However, the language of MCL 500.3106(1)(b) forecloses this possibility by requiring that the "equipment" be "mounted on the *vehicle*," which indicates that the constituent parts of "the vehicle" itself are not "equipment."

With respect to MCL 500.3106(1)(c), "alight" means "to dismount from a horse, descend from a vehicle, etc." or "to settle or stay after descending; come to rest." *Random House Webster's College Dictionary* (1997). See also *New Shorter Oxford English Dictionary* (defining "alight" as "to descend and settle; come to earth from the air").[1] Moreover, that the injury must be sustained "while" alighting indicates that "alighting" does not occur in a single moment but occurs as the result of a process. The process begins when a person initiates the descent from a vehicle and is completed when an individual has effectively "descend[ed] from a vehicle"

[1] Justice MARILYN KELLY's dissent analogizes "entering" and "alighting," concluding that "[i]f opening a vehicle door is part of the entering process, it follows that closing a door can be and usually is part of the alighting process." *Post* at 392. However, "alighting" is neither antonymous to "entering" nor synonymous with "exiting." Therefore, even if opening a door is part of the entering process, *and* even if it follows that closing a door is part of the exiting process, it does *not* follow that closing a door is part of the alighting process.

and has "come to rest"—when one has successfully transferred full control of one's movement from reliance upon the vehicle to one's body.[2] This is typically accomplished when "both feet are planted firmly on the ground." *Krueger v Lumbermen's Mut Cas Co*, 112 Mich App 511, 515; 316 NW2d 474 (1982).[3]

Based on the foregoing analysis, plaintiff is not entitled to benefits under the no-fault act because her injury did not arise out of the use of a parked vehicle under MCL 500.3106(1). Plaintiff was injured when she slipped and fell on a patch of ice while closing the passenger door of her vehicle. Plaintiff had placed a few personal items in the passenger compartment via the passenger door, stood up, and stepped out of the way of the door when she closed the door and fell. Insofar as she was in contact with the *door* of the vehicle at the time of her injury, she was clearly in contact with the vehicle itself, not with "equipment" mounted thereon. Therefore, her injury was not "a direct result of physical contact with equipment permanently mounted on the vehicle . . . ." MCL 500.3106(1)(b). Further, before

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[2] Contrary to Justice MARILYN KELLY's implication, the foregoing analysis of "alighting" makes plain that merely placing one's "feet outside the vehicle on the ground" does *not* constitute a completion of the alighting process. *Post* at 391. Rather, to complete the process, one must "successfully transfer[] full control of one's movement from reliance upon the vehicle to one's body."

[3] Justice MARILYN KELLY's dissent correctly points out that the *Krueger* panel declined to provide " 'a complete definition' " of "alighting." *Post* at 390-391 & n 7, quoting *Krueger*, 112 Mich App at 515. *Krueger* concluded that "an individual has not finished 'alighting' from a vehicle at least until both feet are planted firmly on the ground," *Krueger*, 112 Mich App at 515, but this distinction supports the position of neither side here because it only describes a *necessary* condition of "alighting," without considering its *sufficiency*. Further, as our analysis indicates, we define "alighting" without reference to *Krueger* and adopt the language "planted firmly" simply to illustrate when "alighting" has typically been accomplished.

her injury, plaintiff had been standing with both feet planted firmly on the ground outside of the vehicle; she was entirely in control of her body's movement, and she was in no way reliant upon the vehicle itself. Therefore, she was not in the process of "alighting from" the vehicle. MCL 500.3106(1)(c). At the time of her injury, plaintiff had already alighted.

Because the circumstances of plaintiff's injury are not included in any of the exceptions enumerated in MCL 500.3106(1), defendant is not liable to pay benefits under MCL 500.3105(1). Finally, because defendant did not owe benefits to plaintiff, its refusal to pay them was not unreasonable, and plaintiff is not entitled to attorney fees under MCL 500.3148(1). *Moore v Secura Ins*, 482 Mich 507, 526-527; 759 NW2d 833 (2008).

We reverse the Court of Appeals' judgment and remand this matter to the trial court for further proceedings not inconsistent with this opinion.

YOUNG, C.J., and MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred.

MARILYN KELLY, J. (*dissenting*). I dissent from the majority's decision to reverse the judgment of the Court of Appeals. In my view, plaintiff was "alighting" from her vehicle within the meaning of MCL 500.3106(1)(c) when she was injured. Thus, the trial court correctly denied defendant's motion for a directed verdict on this issue. Because the Court of Appeals properly affirmed that decision, I would deny defendant's application for leave to appeal.

As correctly noted by the majority, the issue in this case is whether defendant is liable to plaintiff for personal protection insurance benefits under the no-

fault act.[1] MCL 500.3105(1) provides that an insurer must pay its insured's expenses incurred for accidental injuries arising out of the ownership, operation, or use of a motor vehicle. However, if injuries occur when a vehicle is parked, the insurer is liable in only three situations: (1) when the vehicle was parked in such a way as to cause unreasonable risk of the injury, (2) when the injury was a direct result of physical contact with equipment permanently mounted on the vehicle, or (3) when the injury was sustained while the insured was occupying, entering into, or alighting from the vehicle.[2]

In this case, there was sufficient evidence from which a reasonable juror could conclude that plaintiff satisfied the third exception. A jury could have concluded that plaintiff was alighting from her vehicle when she was injured. Evidence of this was produced during the direct examination of plaintiff:

> *Q*. So you left your apartment, you headed to your car, then what happened?
>
> *A*. I opened up my passenger door to put my coffee mug, purse and work bag in there, stepped aside to close the car door and that's when I fell.
>
> *Q*. What were you doing when you fell specifically?
>
> *A*. I was closing the car door.
>
> *Q*. Were you touching the car door?
>
> *A*. Absolutely.
>
> *Q*. Are you sure about that?
>
> *A*. Positive.

Plaintiff also described her accident on cross-examination:

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[1] MCL 500.3101 *et seq*.

[2] See MCL 500.3106(1)(a), (b), and (c).

Q. As you approached your car, what were you carrying?

A. I was carrying a purse, coffee mug and a work bag.

Q. Did you have your keys on you?

A. Yes, I did.

Q. What hand were your keys in?

A. My left hand.

Q. What did you do next?

A. I opened the car door.

Q. Which hand did you open the car door with?

A. My right hand.

Q. Then what did you do?

A. I put my book bag, my purse and my coffe [sic] mug into my vehicle.

Q. At that point did you come back out of the vehicle?

A. Yes, I did.

Q. So you were completely out of the vehicle at that point?

A. Yes.

Q. Feet were on the ground?

A. Yes, they were.

Q. What happened next?

A. I stepped out of the way—

Q. When you say stepped out of the way, what do you mean?

A. I stepped out of the way to give my door room to close.

Q. So when you were positioned—where were you positioned along the side of the car?

A. Far enough away to shut my door.

Q. Kind of right where the door would end up shutting? You know, where the door meets the actual car, right at the end of the door?

A. You know, a body's length away from that. I didn't want to shut the door on myself.

* * *

Q. So your shoulders—your back was to the car then, right?

A. Exactly.

Q. What hand did you shut your door with?

A. My left hand.

Q. So your back—the car is behind you, right?

A. Correct.

Q. You're shutting the door with your left hand?

A. Right.

Q. Now, then what happened?

A. Then I fell.

In *Krueger v Lumbermen's Mut Cas Co*,[3] the Court of Appeals considered the meaning of the statutory phrase "alighting from the vehicle" in MCL 500.3106(1)(c). The Court noted that there is no statutory definition of the term "alighting" and that there was no caselaw on point. It nonetheless concluded that, "[a]lthough it is unnecessary to attempt a complete definition of the term at this time, we are convinced that an individual has not finished 'alighting' from a vehicle *at least* until both feet are planted firmly on the ground."[4]

The majority selectively quotes *Krueger*, claiming the case establishes that the alighting process is typically finished when " 'both feet are planted firmly on the ground.' "[5] The majority then summarily concludes that because plaintiff's feet were on the ground outside

[3] *Krueger v Lumbermen's Mut Cas Co*, 112 Mich App 511; 316 NW2d 474 (1982).

[4] *Id*. at 515 (emphasis added).

[5] *Ante* at 386, quoting *Krueger*, 112 Mich App at 515.

her vehicle, she had already completed the alighting process when she fell. Therefore, it reasons, her injuries do not fall within the scope of MCL 500.3106(1)(c).

As noted, *Krueger*'s holding is not as straightforward as the majority posits. Rather, a careful reading reveals that *Krueger* held that alighting from a vehicle extends *at least* to the point at which a person has both feet on the ground. This is consistent with the dictionary's definition of "alight" as to "descend from a vehicle, etc." and "to settle or stay after descending; come to rest."[6]

It follows that alighting from a vehicle is a process that may or may not be complete when a person has both feet on the ground.[7] Indeed, as the Court of Appeals noted, a person could be nearly completely inside a vehicle, yet have placed his or her feet outside the vehicle on the ground. That person could not be said to have alighted. *Krueger*'s holding makes perfect sense given that no temporal limitation on the alighting process is found in the statutory language. And it is also consistent with the underlying policy of the parked-motor-vehicle exclusion of MCL 500.3106(1): to ensure that an injury that is covered by the no-fault act involves the use of the parked motor vehicle as a motor vehicle.[8]

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[6] *Random House Webster's College Dictionary* (2001).

[7] See also *Burks v Kimbrough*, unpublished opinion per curiam of the Court of Appeals, issued August 4, 2009 (Docket No. 282229), p 3 ("[W]e decline [the defendant's] invitation to interpret *Krueger* as creating a bright-line rule precluding coverage under [MCL 500.3106(1)(c)] whenever a claimant has 'two feet . . . planted firmly on the ground.' As we have observed, this Court in *Krueger* expressly refrained from 'attempt-[ing] a complete definition' of the term 'alighting' and explained only that the process was incomplete '*at least*' until both feet firmly contacted the ground.").

[8] See *Putkamer v Transamerica Ins Corp of America*, 454 Mich 626, 633; 563 NW2d 683 (1997).

Similarly, in *Hunt v Citizens Ins Co*,[9] the Court of Appeals recognized that an individual may have both feet on the ground while in the process of entering—and, by analogy, alighting from—a vehicle. The Court expressly held that an injury sustained during that process may be compensable under the no-fault act.[10] Likewise, in *Teman v Transamerica Ins Co*,[11] the Court of Appeals held that opening a vehicle door is part of the process of entering a vehicle for purposes of MCL 500.3106(1)(c). If opening a vehicle door is part of the entering process, it follows that closing a door can be and usually is part of the alighting process.

In this case, plaintiff testified that before she fell, she had partly entered her car to place her mug, purse, and work bag inside. She was completing the act of alighting from the car by shutting the door when she fell. It appears that plaintiff's efforts to close her car door caused her feet to slide out from underneath her on the icy parking lot. She could not have completed the process of alighting from the vehicle and moved to the driver's side without closing the passenger door. If she had fallen while walking to the driver's side, it could not be said that she was hurt while entering or alighting from the vehicle. By contrast, opening or closing the car door is a function of entering or alighting from the vehicle.

There was sufficient evidence for the jury to have concluded as it did that plaintiff was alighting from her vehicle when she was injured and that she is entitled to no-fault benefits. The majority misreads and ignores the long-established precedent of *Krueger* and its prog-

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[9] *Hunt v Citizens Ins Co*, 183 Mich App 660; 455 NW2d 384 (1990).

[10] *Id*. at 664.

[11] *Teman v Transamerica Ins Co of Mich*, 123 Mich App 262, 265; 333 NW2d 244 (1983).

eny when it concludes that the alighting process is complete whenever a person's feet are on the ground.

For these reasons, I dissent from the decision to reverse the judgment of the Court of Appeals and would deny defendant's application for leave to appeal.

CAVANAGH, J., concurred with MARILYN KELLY, J.

HATHAWAY, J. (*dissenting*). Leave to appeal was not granted in this case. Rather, oral argument on defendant's application for leave to appeal was heard in order to determine whether this Court should grant leave to appeal, deny leave to appeal, or take other peremptory action. Having heard oral argument, I would deny leave to appeal because I am not persuaded that this Court should take any further action in this unique, fact-specific case that should have no precedential value.

In re JUSTIN

Docket No. 142076. Argued October 5, 2011 (Calendar No. 11). Decided January 27, 2012. Rehearing denied at 491 Mich 870.

The Judicial Tenure Commission (JTC) filed a formal eight-count complaint against Judge James M. Justin of the 12th District Court, alleging that he had violated Const 1963, art 6, § 30; former MCR 9.104(A)(1), (2), and (4) and MCR 9.205; and Canons 1, 2(A) through (C), and 3(A)(1), (4), and (5) of the Michigan Code of Judicial Conduct by inappropriately dismissing or disposing of cases without having notified the prosecutor or conducted hearings, altering or deleting or stopping the transmission of records that were statutorily required to be sent to the Secretary of State, engaging in ex parte communications, failing to follow plea agreements, failing to promptly dispose of court business, improperly imposing peace bonds, interfering with a case assigned to another judge, and making misrepresentations to the JTC in response to these allegations. The Supreme Court appointed retired District Judge Pamela J. McCabe to act as master. After a formal hearing, Judge McCabe concluded that all but the allegation regarding peace bonds had been proved by a preponderance of the evidence. The JTC adopted the master's findings of fact in their entirety and determined that respondent's misconduct warranted removal from office. The JTC further recommended that respondent be assessed $24,934.19 in costs.

In an opinion by Chief Justice YOUNG, joined by Justices MARKMAN, MARY BETH KELLY, and ZAHRA, the Supreme Court *held*:

The duration, scope, number, and nature of respondent's substantiated acts of judicial misconduct warranted his removal from office.

1. The master correctly found that every allegation in the complaint except that relating to peace bonds was supported by a preponderance of the evidence, and the JTC properly concluded that the proved counts of misconduct, in addition to respondent's prior history of judicial misconduct and the JTC's

own conclusion that respondent had improperly failed to recuse himself from cases involving himself and his wife, warranted his removal from office.

2. The Supreme Court adopted the factual findings of the master and the JTC in full.

3. Respondent's misconduct in summarily and surreptitiously dismissing tickets that had been issued to himself, his wife, and members of his staff, standing alone, was more than sufficient to justify his removal from office. His presumption that the only misconduct inherent in these actions was his failure to recuse himself revealed a misunderstanding of the fundamental purpose of the judicial power to hear and determine controversies, which is the fair ascertainment of the truth. Respondent's method of dismissing cases after having a discussion with only one side of a controversy was a perversion of judicial power, not a valid exercise of it. Additionally, respondent's disregard for plea agreements validly entered into by the prosecutor and defendants and his unilateral dismissal of cases or counts after a defendant had tendered a guilty plea to the charges was without legal authority and implicated the separation-of-powers principles articulated in Const 1963, art 3, § 2. Respondent's multitudinous acts of deleting or altering the abstracts of court records or stopping them from being sent to the Secretary of State as MCL 257.732 requires also provided a basis for removing respondent from office. Finally, respondent's lying under oath during the JTC proceedings was entirely incompatible with judicial office and warrants his removal. Respondent's acts demonstrated a calculated disregard for the law and an intentional effort to undermine the judicial process, which evinced an unacceptable disregard for the role of judge as well as disdain for due process and the right of parties to a fair hearing. Respondent's clear disregard for the rule of law was incompatible with a judge's duty to uphold the law and rendered him unfit for judicial office.

Respondent ordered removed from office; the JTC ordered to submit an itemized bill of costs incurred in prosecuting the complaint.

Justices CAVANAGH, MARILYN KELLY, and HATHAWAY concurred in the result only.

Paul J. Fischer and *Glenn J. Page* for petitioner.

Dickinson Wright PLLC (by *Dennis C. Kolenda*) for respondent.

YOUNG, C.J. The Judicial Tenure Commission (JTC) has recommended that this Court remove respondent, 12th District Court Judge James Justin, from office for numerous instances of documented judicial misconduct. Respondent's multitudinous acts of proved misconduct sketch a common theme: respondent failed to follow the law, apparently believing that it simply did not apply to him.

Instances of respondent's judicial misconduct include "fixing" (personally and surreptitiously dismissing) traffic citations issued to himself, his spouse, and his staff; preventing the transmission of or altering court information that was legally required to have been transmitted to the Secretary of State;[1] dismissing cases without conducting hearings or involving the prosecutor; failing to follow plea agreements; and making false statements under oath during the JTC hearing.

In this case, respondent's fixing of traffic tickets issued to himself, his family, and staff *alone* warrants the most severe of sanctions. However, respondent's substantiated misconduct is much more extensive. The duration, scope, and sheer number of respondent's substantiated acts of misconduct are without precedent in Michigan judicial disciplinary cases. Respondent's long-term pattern of judicial misconduct constitutes a negation of the proper exercise of judicial authority that more than justifies the sanction imposed.

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[1] Pursuant to MCL 257.732, courts are required to forward an "abstract," or synopsis, of a person's court record to the Secretary of State for violations of the Michigan Vehicle Code, MCL 257.1 *et seq.*, specified statutory violations, and corresponding local ordinance violations. "The failure, refusal, or neglect of a person to comply with" the requirements of MCL 257.732 "constitutes misconduct in office and is grounds for removal from office." MCL 257.732(14).

We order respondent's removal from office. Moreover, we order the JTC to submit a bill of costs, itemizing what portion of the costs may be attributed to the conduct or statements of respondent that give rise to liability for the payment of "costs, fees, and expenses incurred by the [JTC] in prosecuting the complaint . . . ." MCR 9.205(B).

I

On November 12, 2010, the JTC filed Formal Complaint No. 87 against Judge Justin,[2] alleging that he had committed judicial misconduct in violation of Const 1963, art 6, § 30;[3] MCR 9.104(A)(1), (2), and (4)[4] and

[2] An amended formal complaint was filed on January 24, 2011.

[3] Const 1963, art 6, § 30(2) states in part:

> On recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for . . . misconduct in office . . . or conduct that is clearly prejudicial to the administration of justice.

[4] At the time the complaint was filed, MCR 9.104 stated in part:

> (A) The following acts or omissions by an attorney, individually or in concert with another person, are misconduct and grounds for discipline, whether or not occurring in the course of an attorney-client relationship:
>
> (1) conduct prejudicial to the proper administration of justice;
>
> (2) conduct that exposes the legal profession or the courts to obloquy, contempt, censure, or reproach;
>
> * * *
>
> (4) conduct that violates the standards or rules of professional responsibility adopted by the Supreme Court[.]

MCR 9.104 was amended on April 19, 2011, effective September 1, 2011. Apart from the removal of the designation "(A)" and the replacement of "responsibility" with "conduct" in subrule (4), the quoted material remains unchanged. See 489 Mich civ (2011).

MCR 9.205;[5] and Canons 1,[6] 2(A) through (C),[7] and

[5] MCR 9.205 states in part:

(A) Responsibility of Judge. A judge is personally responsible for the judge's own behavior and for the proper conduct and administration of the court in which the judge presides.

(B) Grounds for Action. A judge is subject to censure, suspension with or without pay, retirement, or removal for . . . misconduct in office . . . or conduct that is clearly prejudicial to the administration of justice. . . .

(1) Misconduct in office includes, but is not limited to:

(a) persistent incompetence in the performance of judicial duties;

(b) persistent neglect in the timely performance of judicial duties;

(c) persistent failure to treat persons fairly and courteously;

(d) treatment of a person unfairly or discourteously because of the person's race, gender, or other protected personal characteristic;

(e) misuse of judicial office for personal advantage or gain, or for the advantage or gain of another; and

(f) failure to cooperate with a reasonable request made by the [JTC] in its investigation of a judge.

[6] Code of Judicial Conduct, Canon 1 states in part:

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should personally observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. A judge should always be aware that the judicial system is for the benefit of the litigant and the public, not the judiciary.

[7] Code of Judicial Conduct, Canon 2 states in part:

A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. . . .

B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to

3(A)(1),[8] (4), and (5)[9] of the Michigan Code of Judicial Conduct. The complaint alleged eight counts of misconduct.

A. THE FINDINGS OF THE MASTER

On November 29, 2010, this Court appointed the Honorable Pamela J. McCabe as master to hear the case. The master's report, filed on March 24, 2011, concluded that seven of the eight counts of judicial misconduct alleged in the amended complaint had been proved by a preponderance of the evidence. The allegations and the relevant findings of fact are as follows.

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a person's race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others.

[8] The alleged violations of Canon 3(A)(1) included, but were expressly not limited to, violations of MCL 257.732; MCL 257.328; MCL 257.907; MCL 769.1(f); MCL 769.6; MCL 771.1(2); MCL 772.1 *et seq.*; and MCL 780.621.

[9] Code of Judicial Conduct, Canon 3(A) provides in part:

(1) A judge should be faithful to the law and maintain professional competence in it. . . .

* * *

(4) A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding . . . .

* * *

(5) A judge should dispose promptly of the business of the court.

COUNT 1: INAPPROPRIATE DISMISSAL OF CASES

The first count of the complaint alleged that respondent had dismissed cases and inappropriately disposed of cases without holding hearings and without notice to or the authorization of the prosecuting attorney. Perhaps most significant, the master found that this count had been proved and included respondent's admission that he dismissed four citations issued to himself,[10] five citations issued to his wife,[11] and citations issued to his court officer and court reporter.[12] All the tickets had been dismissed "after explanation," but without a hearing or advising the prosecutor.

Beyond concluding that respondent had fixed tickets for himself, his wife, and his staff, the master also concluded that respondent had engaged in a pattern of favoritism and "conferred favored status on many who came before him." The master's report cited two illustrations of respondent's pattern of leniency and favoritism.[13] The master also found that at the hearing, the

[10] The master noted that respondent claimed to have a defense to his parking citations: that someone else was driving his vehicle. Moreover, respondent "expressed no regret" about fixing his own tickets.

[11] Respondent's wife had received three speeding tickets, a citation for having defective equipment, and a citation for disobeying a stop sign. The five citations were issued between November 2000 and October 2009.

[12] Each staff member had received a citation for speeding.

[13] The first instance involved a defendant by the last name of Wilson. In 2005, Wilson pleaded guilty to two counts of driving without a license and violations of child-restraint requirements. When she failed to pay the fines and costs, a bench warrant was issued by another judge of the 12th District Court. In February 2008, respondent set aside the guilty pleas and, contrary to law, removed the abstracts of conviction from the court's computer system. That same month, Wilson pleaded guilty to seven counts of driving without a license. While those cases were pending, Wilson accumulated three additional violations of driving without a license, as well as other civil infractions and a misdemeanor. The master noted that Wilson pleaded guilty to 10

examiner had proved "many cases" in which respondent dismissed charges or dismissed cases without the knowledge or approval of the prosecutor. The master noted that this was often done at the arraignment, when the prosecutor was not present. The master cited two examples in support of her conclusion.[14] As one might expect when a judge refuses to allow one party to know about, much less participate in, a judicial proceeding, the master rejected respondent's claims that he only dismissed cases if a "dismissal was inevitable" and that he only dismissed citations when presented "with solid evidence justifying such action."

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counts of driving without a license, but respondent waived all the fines and costs and stopped all 10 abstracts from being sent to the Secretary of State, resulting in Wilson's avoiding the fees required by MCL 257.732a. The master further noted that respondent had stopped all the abstracts and waived the fines and costs without notice to the prosecutor.

The second instance of favoritism involved a defendant named Wheeler, who had pleaded guilty in 2009 to failing to file a 2005 tax return. In addition to paying her tax liability, Wheeler paid $125 in fines and costs. Afterward, Wheeler's mother wrote a letter to respondent, complaining of the "grave injustice" done to her daughter as a result of the fines and costs. Five months after Wheeler pleaded guilty, respondent set aside the guilty plea, dismissed the case, and returned the fines and costs, all without notice to the city of Jackson. In correspondence sent to Wheeler and her mother, respondent indicated that the "file should not have been opened" and that the "city doesn't deserve any fines and costs as a result of the opening of the file."

[14] In the first case, a defendant named Brown had been charged with two crimes. Respondent dismissed one count, and Brown pleaded guilty to the other. The township's attorney "was unaware of the case and had no knowledge of the dismissed charges."

In the second case, a defendant named Ross had received two citations for having no proof of insurance and expired plates. Respondent dismissed the charges outright, concluding that the "police were improperly stopping citizens for brake light violations." The dismissal of the case was done without notice to the prosecutor or a hearing.

COUNT 2: COURT RECORD ABSTRACTS

The second count of the complaint, which the master concluded had been proved by a preponderance of the evidence, alleged that respondent had improperly altered, deleted, or stopped summaries of court records from being transmitted to the Secretary of State as required by MCL 257.732. The master found that respondent had entered or caused to be entered false information into the court's judicial information system, causing the cancellation of the abstracts.[15] Additionally, the master found that respondent had engaged in a pattern of dismissing, in violation of the law, tickets that may properly be dismissed under certain circumstances[16] and removed court record abstracts for such tickets in violation of the law.[17] The

[15] Respondent admitted that he would cancel an abstract properly sent to the Secretary of State by indicating that the previously transmitted abstract had been "sent in error." However, no error existed. Respondent simply wanted "the defendant to get his license turned around" and avoid the imposition of sanctions by the Secretary of State.

[16] When a motorist receives a citation for having no proof of insurance, fines and costs may not be assessed and an abstract may not be forwarded to the Secretary of State if, *before* the appearance date on the citation, the motorist submits proof to the court that the motor vehicle was insured at the time the violation occurred. MCL 257.328(3) (emphasis added). When a motorist receives a citation for defective equipment, a court is required to waive the "fine, costs, and assessments" if it receives certification "by a law enforcement agency" that the defective equipment was repaired "*before* the appearance date on the citation." MCL 257.907(9) (emphasis added). The allegations established that, contrary to law, respondent had dismissed tickets for both no proof of insurance and defective equipment *well after* the appearance date on the citation.

[17] MCL 257.328(3)(b) requires that a court "not cause an abstract of the court record to be forwarded to the secretary of state" if a motorist provides proof that the vehicle was insured at the time of the violation "*before* the appearance date on the citation." (Emphasis added.) The allegations established that, contrary to law, respondent caused court record summaries to be removed well after the appearance date on the citation.

master rejected respondent's claim that he "always saw proof of insurance" before dismissing those tickets. In addition to the fact that most of the cases presented were dismissed off the record, the master identified two specific instances indicating that proof of insurance had not, in fact, always been provided before tickets were dismissed.[18]

The master also found that respondent had prevented court record abstracts from being transmitted to the Secretary of State or caused abstracts to be deleted in violation of the law. In 2007, the chief judge of the 12th District Court became aware that respondent had deleted an abstract and discussed this with respondent. Respondent admitted that he had mistakenly deleted the abstract. The chief judge told respondent to discontinue this practice. However, because respondent continued the practice of stopping or deleting court record abstracts, the chief judge removed respondent's authority to directly access the relevant portion of the court's computer system in 2009. The master found that respondent, undeterred, used others to continue this practice: respondent "sent 'stacks' of notes to his court clerk" ordering her to "stop abstracts in cases which should be properly abstracted." In fact, respondent acknowledged that he had caused court record abstracts to be stopped in order to "avoid further suspension" of a defendant's driving privileges. The master found that

[18] In the first case, a defendant named Smith defaulted on a citation for no proof of insurance in November 2006. In July 2008, 20 months *after* Smith had defaulted, respondent "removed the abstract with no proof of insurance produced." In the second case, a defendant named Stacey defaulted on a citation for having no proof of insurance that had been issued in March 2009. Respondent testified that he removed the abstract in September 2009 and waived the fines and costs because the "vehicle was insured." However, Stacey acknowledged on the record that her automobile was not insured at the time the citation was issued.

respondent "stopped multiple convictions for the same defendant, deleted abstracts years after conviction, and for cases assigned to other judges." Moreover, the master concluded that respondent's act of directly stopping abstracts and ordering his clerk to do the same violated the law.

COUNT 3: EX PARTE COMMUNICATIONS

The master found that the third count of the complaint had been proved by a preponderance of the evidence because respondent had "engaged in ex parte communications with defendants that resulted in dismissal of cases" in violation of Canon 3(A)(4). The master noted several cases in support of her conclusion, including ex parte communications between respondent and his wife before he dismissed her five tickets, as well as ex parte communications between respondent and his staff members before dismissing their tickets. The master also cited respondent's communications with Roscina Ragland, as described later in the discussion of count seven, and respondent's ex parte communications with a woman named Jaime Chapman.[19] The master indicated that respondent admitted having dismissed cases after "discussing the matters in the hallway" without the involvement of the prosecuting attorney because doing so provided "optimum, convenient service."

[19] In April 2010, respondent was observed talking with Chapman about her traffic tickets in the hallway of the courthouse. Subsequently, respondent went to the clerk's office and asked the staff to "make amendments to the charges." Respondent dismissed Chapman's ticket for no proof of insurance, and Chapman pleaded guilty to having expired plates. The staff member testified that she did not observe any proof of insurance and that Chapman was "very grateful" and thanked respondent several times.

COUNT 4: FAILURE TO FOLLOW PLEA AGREEMENTS

The master found that the fourth count of the complaint had been proved by a preponderance of the evidence because respondent had failed to follow plea agreements between the prosecuting attorney and defendants without advising the prosecutor. Respondent admitted that he had dismissed or reduced charges without the prosecutor's authorization after the defendant and prosecutor had reached a plea agreement.[20] In other instances, respondent refused to order that a defendant pay the costs of prosecution after the defendant specifically agreed to pay those costs as part of a negotiated plea agreement. The master noted that respondent did not order costs in "most of the cases" the examiner presented to the master. While respondent claimed that he did not order payment of the costs of prosecution because "it would have been illegal to assess them," the master rejected this rationalization because respondent's pattern of cost imposition did not correlate to its legality.[21] By respondent's admission, he ordered costs when there was no statutory authority to do so and failed to order them when the law expressly

[20] One illustration the master cited involved a defendant named Goolsby, who had been issued citations for driving with a suspended license and defective equipment. According to the terms of the negotiated agreement, the case was to be adjourned for eight weeks so that Goolsby could get his license reinstated. If he was successful, the original charges would be dismissed and Goolsby would be permitted to plead guilty to two counts of having improper license plates and pay $50 in costs for each count. However, respondent accepted a guilty plea to one count of improper plates, dismissed the other count entirely, and did not order costs. The master also cited a similar case involving a defendant named Cramer.

[21] The master also noted that several witnesses testified that, at the time costs were sought in conjunction with plea agreements, respondent never indicated that he believed that the imposition of costs was illegal.

allowed it.[22] Rather than legal authority being the pivotal consideration in deciding whether costs would be imposed, the master found that there was "no philosophical or legal basis" underlying the imposition of costs. "The standard for respondent seemed to be whether the defendant could pay, whether there would be any money to the court" after costs were paid, and whether the defendant received a favorable plea bargain from the prosecutor.

COUNT 5: INAPPROPRIATE DELAYS

The master found that the fifth count of the complaint had been proved by a preponderance of the evidence because respondent had "failed to promptly dispose of the business of the court," resulting in "dozens of cases" that were "pending for years."[23] The master also noted several cases that had been serially adjourned and left open for extended periods until the defendants complied with special bond conditions imposed by respondent, including writing book reports, getting a driver's license restored, or getting an A in math. Respondent's continued adjournments and delays resulted in "chaos" for the court staff, difficulty tracking files, and larger caseloads. The master found that after numerous

[22] The master cited 31 cases in which respondent did not order a defendant to pay the costs of prosecution in drunk driving cases although the law permitted it, 35 cases in which respondent failed to order costs per the plea agreement, and 35 cases in which respondent ordered a defendant to pay costs despite the lack of legal authority to do so.

[23] One such case the master discussed involved a defendant named Wicks who was arraigned in 2001 for two misdemeanor offenses. As of 2010, Wicks's 2001 file remained open because he had failed to comply with the terms of his sentence. While on probation, Wicks pleaded guilty to an offense in 2004. Respondent stopped the court record abstract from being transmitted to the Secretary of State and adjourned the case "approximately 40 times" until June 2010, at which point the file was closed and fines and costs were waived.

adjournments and delays, some defendants "eventually failed to appear" to court and were arrested and imprisoned without bond as a consequence.[24] The master noted that while these cases were delayed, defendants frequently committed new offenses, which were "oftentimes disposed of with no penalty."

The master rejected respondent's claim that the excessive delays were proper because he had the authority to delay sentencing for one year[25] and could place a defendant on probation for up to two years.[26] Respondent claimed that he had the authority to delay a defendant's sentencing for as long as four years. The master found that respondent's claim was "disingenuous" and "appear[ed] to be made up after the fact."[27] The master also rejected respondent's claim that extended delays were comparable to a specialty court and that cases were delayed for "prolonged periods" for "salutary purposes." Rather, the master concluded that

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[24] The master noted one example involving a minor who had been charged in June 2007 with being in possession of alcohol, an offense that does not permit the imposition of a jail sentence. See MCL 436.1703(1)(a). The case was adjourned 37 times, requiring the defendant to make numerous appearances in court. Ultimately, the defendant was jailed on a bench warrant for failing to appear. The case was eventually resolved in July 2010 by a different judge of the 12th District Court.

[25] See MCL 771.1(2) ("In an action in which the court may place the defendant on probation, the court may delay sentencing the defendant for not more than 1 year to give the defendant an opportunity to prove to the court his or her eligibility for probation or other leniency compatible with the ends of justice and the defendant's rehabilitation . . . .").

[26] MCL 771.2(1) provides that, with narrow exceptions, "if the defendant is convicted for an offense that is not a felony, the probation period shall not exceed 2 years."

[27] The master's conclusion was based on the fact that the court files did not indicate that respondent was imposing a delayed sentence, none of the defendants were advised they were receiving a delayed sentence, and many of the delays occurred either before the guilty plea was tendered or after the defendant was sentenced.

"[i]t was respondent's practice to hold defendants for unspecified periods of time, unsentenced, for completion of tasks that did not necessarily address the offense for which the defendants were being sentenced."

COUNT 6: PEACE BONDS

The master found that the sixth count of the complaint, which alleged that respondent did not follow the proper procedures when imposing peace bonds, had *not* been proved by a preponderance of the evidence. While respondent "lacked due diligence in not knowing the law" regarding peace bonds, there was no evidence of misconduct.

COUNT 7: INTERFERENCE WITH A CASE

The master found that the seventh count of the complaint, which alleged that respondent had improperly interfered with a case assigned to another judge, had been proved by a preponderance of the evidence. Respondent had a conversation with Roscina Ragland regarding her landlord-tenant case before 12th District Court Judge Michael J. Klaeren. Ragland, described by respondent as a "frequent flyer," showed respondent an order of eviction issued by Judge Klaeren. The previous day, Judge Klaeren had declined to stay the order of eviction as Ragland's counsel requested. Believing that Ragland was being "abused," respondent approached Judge Klaeren and spent 30 to 45 minutes attempting to persuade him to stay the order of eviction. When that effort was unsuccessful, respondent contacted the court's process server, Emmanuel Morales. Respondent told Morales that both Morales and the plaintiff's attorney "could be sued" if the writ were executed. Judge Klaeren held a hearing and issued a second writ

because Mr. Morales was "afraid to execute the writ." The master rejected respondent's claim that his activities were indistinguishable from the actions determined not to constitute judicial misconduct in *In re Hultgren*.[28]

COUNT 8: MISREPRESENTATIONS

The master found that the eighth count of the complaint, which alleged that respondent had made misrepresentations to the JTC, had been proved by a preponderance of the evidence.[29] Specifically, in respondent's response to the 28-day notice provided by the JTC,[30] respondent admitted dismissing tickets without hearings or without authorization from the prosecutor, but stated that the dismissals were "without objection in the end." This statement, according to the master, falsely implied that the dismissals had been done with prosecutorial knowledge and approval. Additionally, respondent's response to the 28-day letter stated that he only dismissed cases "when a dismissal was inevitable" and only when "presented with solid evidence" justifying dismissal. These statements were found to be false because the prosecutors had no knowledge that cases were being dismissed, they would not have consented to dismissal, and the "overwhelming evidence" estab-

[28] *In re Hultgren*, 482 Mich 358; 758 NW2d 258 (2008). The master noted that, in contrast to *Hultgren*, respondent contacted the assigned judge directly for the purposes of advocating for Ragland. Additionally, Ragland was represented by an attorney, whereas the defendant in *Hultgren* was an "immigrant with limited language skills." Lastly, in contrast to *Hultgren*, respondent "used the power of his office to stop the writ of eviction by calling the court officer" and telling the officer that he "could be sued if he executed it."

[29] The master also found that two instances of misrepresentation had not been proved by a preponderance of the evidence.

[30] See MCR 9.207(D)(1).

lished that respondent dismissed tickets "with no evidence shown whatsoever."[31]

Similarly, respondent was found to have made false statements in his response to the 28-day letter and his answer regarding abstracts required to be sent to the Secretary of State. Respondent stated that he never altered or deleted an abstract and that court staff, rather than respondent, sent the relevant information to the Secretary of State. This was found to be a false statement, as respondent acknowledged having the ability to directly access the relevant portion of the court's computer system until his access was revoked because of his misuse. Respondent's response also stated that he merely informed "the [Secretary of State] of changes in the status of a case" and that the reasons given by respondent for the correction of abstracts "have been accurate." These assertions were determined to be false. Respondent admitted at the hearing that the code "sent in error" had been entered "in order to cancel an abstract" that had otherwise properly been transmitted to the Secretary of State. Moreover, there was "abundant proof" that, after defendants pleaded guilty, respondent "stopped, or had stopped, abstracts which were statutorily required to be sent to the [Secretary of State]." The master also noted that respondent "removed or deleted abstracts" sometimes "years after conviction" when, in fact, there had been no change in the status of a case. Indeed, the master found "abundant evidence" showing that respondent "routinely and frequently directly stopped, or had a clerk stop, abstracts for the sole purpose of avoiding negative consequences from the Secretary of State."[32]

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[31] These cases included "those of his wife, court staff and himself."

[32] The master noted that "[r]espondent acknowledged this repeatedly."

Further, at the hearing before the master and in his response to the 28-day letter, respondent stated that he did not order defendants to pay the costs of prosecution because it was illegal and that "most of the cases which included [costs of prosecution] as part of the plea bargain did not qualify." This assertion was found to be false because the "facts admitted at the hearing" showed that respondent ordered costs in cases that did not qualify under the statute and failed to order costs when it was statutorily permissible. Rather, the master held that respondent's reasons for not ordering costs "had to do with what the defendant could afford and whether the court would get any money" after the costs were paid.

B. THE DECISION AND RECOMMENDATION OF THE JTC

After hearing oral argument, the JTC issued its decision and recommendation for discipline. The JTC adopted the master's findings of fact "in their entirety," concluding that counts 1, 2, 3, 4, 5, 7, and 8 of the amended complaint had been proved by a preponderance of the evidence. The JTC determined that respondent's misconduct warranted removal from office and "highlight[ed] five particular factual findings"[33] as well as respondent's misleading statements to the commission as providing the basis for the JTC's "conclusion regarding the appropriate sanction." The JTC discussed at length the highlighted findings, but reiterated that it "adopt[ed] and incorpo-

[33] The five "highlighted" factual findings were (1) respondent's dismissing his four parking tickets without notice to the prosecutor or chief judge, (2) respondent's dismissing the tickets of his wife, staff, and an acquaintance of his wife without notice to the prosecutor or chief judge, (3) respondent's pattern of improper dismissals without hearings or notice to the prosecutor, (4) respondent's pattern of interfering with abstracts sent to the Secretary of State's office, and (5) respondent's direct interference with a case pending before a different judge.

rate[d]" the "balance of the master's factual findings" to the extent "not already set forth" in the JTC's decision. The JTC concluded that respondent's misconduct violated Const 1963, art 6, § 30; MCR 9.104(A)(1), (2), and (4); MCR 9.205 and 9.208(B); Canons 1, 2(A), 2(B), 2(C), 3(A)(1), 3(A)(4), and 3(A)(5) of the Code of Judicial Conduct; MCL 257.328(3); MCL 257.907(9); and MCL 257.732. Additionally, the JTC concluded that respondent violated the disqualification rules in MCR 2.003(C) and Canon 3(C) in failing to recuse himself from cases involving himself and his wife.

In determining the appropriate sanction, the JTC assessed the factors set forth in *In re Brown*.[34] Finding that respondent's misconduct implicated six of the seven *Brown* factors, the JTC concluded that a severe sanction was warranted. In addition to the *Brown* factors, the JTC noted that respondent had a prior history of judicial misconduct. In 1998, respondent received a public censure for misconduct wherein he "intentionally manipulated fines and costs in an effort to punish the City of Jackson for its actions involving the pensions of certain city employees."[35] The JTC noted that the present case was similar to the prior case of misconduct in that "respondent kept engaging in wrongful behavior after the Chief Judge directed him to stop." Given respondent's "deliberate and repeated decisions to circumvent the judicial process," the JTC concluded that respondent was "unfit to sit as a judge" and therefore recommended his removal. The JTC also asked that respondent be assessed costs in the amount of $24,934.19 for his intentional misrepresentations.

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[34] *In re Brown*, 461 Mich 1291, 1292-1293 (1999).

[35] See *In re Justin*, 456 Mich 1220 (1998). In that matter, respondent entered into a consent agreement with the JTC for a public censure.

II

The power to discipline a judge resides exclusively in this Court, but it is exercised on recommendation of the JTC.[36] This Court reviews de novo the factual findings and the recommendations of the JTC.[37] The proper standard of proof to be used in judicial tenure cases is a preponderance of the evidence.[38]

On review of the entire record, we agree with and adopt in full the factual findings of the master and the JTC. Furthermore, we adopt the disciplinary recommendation of the JTC. It is fair to say that the common themes running throughout respondent's substantiated acts of misconduct are a calculated disregard for the law and an intentional effort to undermine the judicial process, as deemed warranted or expedient by the respondent. Such misconduct evinces an unacceptable disregard for the role of judge as well as disdain for due process and the right of parties to a fair hearing.

Respondent's actions are completely antithetical to the privilege of being a judge and more than adequately justify his removal from office.

To begin with, respondent's misconduct in fixing his own tickets and the tickets of his wife and staff, standing alone, is *more* than sufficient to justify his removal from office. Respondent used the authority of his office to bypass the normal adjudicatory process and permit wrongdoers to evade responsibility for violating the law. Respondent summarily dismissed four tickets issued to himself, five tickets issued to his wife, and two tickets issued to members of his staff. Respondent acknowledged that he dismissed these tickets, but claimed that the only

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[36] Const 1963, art 6, § 30.

[37] MCR 9.225; *In re Somers*, 384 Mich 320, 323; 182 NW2d 341 (1971).

[38] MCR 9.211(A); *In re Loyd*, 424 Mich 514, 521; 384 NW2d 9 (1986).

misconduct he committed when doing so was failing to recuse himself from the cases. Respondent's assertion presumes that, apart from respondent's failure to recuse himself, the cases were otherwise properly resolved through the judicial process and the dismissals were conducted in accordance with Michigan rules and procedures, as one would ordinarily expect when resolving a legal dispute. This presumption is, quite simply, false.

In 1859, this Court described "judicial power" as "the power to hear and determine controversies between adverse parties, and questions in litigation."[39] The fundamental purpose in resolving such controversies is quite simple: the fair ascertainment of the truth.[40] While it is axiomatic that respondent could not sit as a neutral arbiter over his own cases, the simple fact of the matter is that respondent's actions were deliberately calculated to *ensure that no court proceedings would ever be held*. When respondent fixed his own tickets, for example, he apparently provided an "explanation"[41] to himself and, having found his own explanation credible, simply dismissed his tickets.[42] The entire judicial pro-

[39] *Daniels v People*, 6 Mich 381, 388 (1859).

[40] *People v Johnson*, 356 Mich 619, 621; 97 NW2d 739 (1959) (noting that a criminal trial is "an inquiry primarily directed toward the fair ascertainment of truth").

[41] There is absolutely no statutory authority permitting a judge to dismiss a case "after explanation." Respondent cites MCL 600.8715(3), MCL 600.8809(2)(b), MCL 600.8811, and MCL 600.8815 in support of his claimed authority. However, each of these statutory provisions concerns a defendant's ability to *admit responsibility* for his civil infraction "with explanation." While a defendant's explanation may serve to mitigate the sanction imposed, see MCL 600.8715(4) and MCL 600.8815(4), a wholesale *dismissal* of the case after a defendant has admitted responsibility for the violation does not appear to be included among the available "sanctions." See MCL 600.8727(2); MCL 600.8827(2).

[42] Ostensibly, the "explanation" respondent provided to himself was that he was not responsible for his parking tickets because someone else

cess was consciously sidestepped. There was no public hearing, no opposing party present, no evidence presented, no cross-examination of witnesses, and none of the other mechanisms that provide a fair ascertainment of the truth.[43] In short, respondent deliberately abused the judicial power with which he was entrusted to prevent the truth of his own wrongdoing from being discovered. While respondent claimed that dismissing his own tickets "provided the least expensive way of handling the situation for the court," it is patently obvious that dismissing his own tickets provided respondent the least expensive resolution *for himself*.

Respondent's intentional abuses of judicial power to benefit himself, his spouse, and his staff are inconsistent with his oath of office and deleterious to the integrity and honor of the judiciary.[44] Respondent's belief that he is above the law, and not "as subject to the law as those that appear before" him, renders him unworthy of holding judicial office.[45]

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was driving his automobile at the time each ticket was issued. However, even this portion of respondent's excuse is without legal merit. Under Michigan law, the owner of the vehicle "is prima facie responsible" for civil parking infractions, MCL 257.675c(1), and may only assert an "affirmative defense" if the vehicle was "in the possession of a person whom the owner had not knowingly permitted to operate the vehicle," MCL 257.675c(2). The statute applies to both statutory violations and violations of "a local ordinance prohibiting or restricting the stopping, standing, or parking of a vehicle . . . ." MCL 257.675c(1).

[43] At the end of his testimony before the JTC, respondent acknowledged that he "should have" presented his defense to a visiting judge.

[44] The oath of office respondent took requires him to "solemnly swear" to support the Constitution and to "faithfully discharge the duties of" a district court judge. See MCL 168.467j; Const 1963, art 11, § 1.

[45] *In re Noecker*, 472 Mich 1, 13; 691 NW2d 440 (2005) (holding that a judge's conduct "seriously undermined the public's faith that judges are as subject to the law as those who appear before them" and justified removal from office).

While respondent's misconduct in fixing his tickets and the tickets of his wife and staff warrants removal from office, respondent's misconduct was regrettably not so limited. The record shows that on numerous occasions, respondent dismissed citations and misdemeanor charges for select defendants without a hearing or notice to the prosecutor.[46] Respondent admits dismissing cases after "discussing the matters in the hallway" with a defendant and without advising the prosecuting attorney because he believed this manner of case resolution provided "optimum, convenient service."[47] Respondent provides no authority for this provision of "optimum, convenient service" because, quite obviously, none exists. As discussed, the core of "judicial power" involves the power to hear and determine controversies between adverse parties. Respondent's method of dismissing cases after having a discussion with only one side of a controversy is not a valid exercise of the judicial power; rather, it is a *perversion* of judicial power. Apparently, respondent believed that providing what he considered "optimum, convenient service" trumped the law and the canons of judicial ethics and gave him license to do away with the truth-finding process *entirely*.[48]

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[46] While the citations and charges were mostly dismissed "after explanation," in two instances respondent ordered cases "dismissed in the interest of justice." Respondent provided no rationalization for this alternative means of dismissing criminal charges.

[47] Respondent also testified that he dismissed charges in one case so that he would not have to set the case for "pretrial and trial." In another case, respondent dismissed a charge because despite the fact that the defendant readily admitted his guilt to the offense, "the township prosecutor had already departed from the building."

[48] Interestingly, while some citizens received the "optimum, convenient service" of having their tickets and charges summarily dismissed, other citizens were forced to endure the inconvenience and burden of countless adjournments and delays, requiring frequent court appearances. It is

Additionally, respondent felt compelled to "improve upon" validly entered plea agreements between the prosecutor and defendants, even going so far as to dismiss cases or counts *after* a defendant had tendered a guilty plea to the charges. Respondent has identified no authority that would permit him to dismiss criminal charges in this manner. Indeed, such actions implicate the separation of powers principles[49] articulated in Const 1963, art 3, § 2.[50] Also, without informing the prosecutor, respondent failed to follow plea agreements that required the payment of costs. While respondent claims that the

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unclear how this latter group fit into respondent's theory of providing "optimum, convenient service."

Moreover, respondent's belief that expediency could trump the rule of law had repercussions for the entire 12th District Court. When citizens who had received "optimum, convenient service" in respondent's courtroom later found themselves in another judge's courtroom, where the rule of law, not "optimum, convenient service," was the guiding principle, these citizens sometimes became confused and angry. As the chief judge of the court explained:

> These people were indignant with us when we imposed a sentence, because [respondent] didn't do this. Why are you doing this to me? Why are you sentencing me? Because [respondent] didn't do this. It was a different kind of justice in that courtroom than the justice that was received by or administrated by the other three judges. And, yes, there were repercussions; there were people that were extremely angry, people who questioned our authority for doing what we were doing.

[49] As this Court has explained,

> [t]he power to determine whether to charge a defendant and what charge should be brought is an executive power, which vests exclusively in the prosecutor. The exercise of judicial power over the discharge of the prosecutor's duties "is limited to those activities or decisions by the prosecutor that are unconstitutional, illegal, or ultra vires." [*People v Gillis*, 474 Mich 105, 141 n 19; 712 NW2d 419 (2006) (citations omitted).]

[50] That section provides: "The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution."

imposition of such costs was illegal, we agree with the master that the veracity of respondent's claimed belief is belied by his inconsistent pattern of ordering costs. Respondent's acts of failing to order costs as part of the plea agreement in some cases in which they were explicitly permitted by law and ordering costs in other cases in the complete absence of statutory authority undercut any claim that respondent *legitimately* believed that the imposition of costs was illegal.[51]

Respondent's multitudinous acts of deleting or altering the abstracts of court records to be sent to the Secretary of State as MCL 257.732 requires or stopping them from being sent also provides a basis for removing respondent from office. By respondent's own admission, he ordered that abstracts required by law to be sent not be sent, removed or deleted validly entered abstracts, and entered false information into the system to accomplish the removal.[52] However, the law is absolutely clear regarding respondent's actions: they are utterly and categorically *prohibited*. The Legislature has indicated that the "failure, refusal, or neglect of a person to comply" with the reporting requirements of MCL 257.732 "constitutes misconduct in office and is grounds for removal from office."[53] Moreover, subject to exceptions not applicable here, "a court shall not order expunction of any violation reportable to the secretary of state . . . ."[54]

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[51] Moreover, if respondent believed that a term in the plea agreement was illegal, he should have declined to accept the plea agreement, permitting the prosecutor and defendant to return to the negotiating table. See MCR 6.302(A).

[52] Because each abstract is "entered upon the master driving record of the person to whom it pertains," MCL 257.732(15), respondent's acts had the effect of clearing or improving the master driving record of the lucky beneficiaries of respondent's munificence.

[53] MCL 257.732(14).

[54] MCL 257.732(22).

Respondent argues that because MCL 257.732 imposes the duty to forward court record abstracts on "municipal judge[s] and each clerk of a court of record," the statute is "not applicable to him" because he is neither a municipal judge nor a court clerk. However, while MCL 257.732(1) does indicate that "the municipal judge or clerk of the court of record" must forward the court record abstracts to the Secretary of State, the scope of MCL 257.732(14) is not so circumscribed: it applies to "a person," a category that undeniably includes respondent.[55] Moreover, the testimony of the chief judge of the 12th District Court indicated that respondent was the only judge in that court to make entries into the court's computer system.[56] The evidence also established that respondent had ordered his staff to stop the entry of abstracts in violation of MCL 257.732. It simply provides no defense that respondent elected to access the system instead of court staff or ordered court staff to violate the law on his behalf. Respondent's unabashed and willful violation of the statutory requirements provides further support for the sanction of removal.

Finally, respondent has been determined to have lied under oath during the JTC proceedings. This is entirely incompatible with judicial office and warrants removal. We summarize three instances of respondent's lying under oath.

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[55] Even if we were to conclude that MCL 257.732 was not directly applicable to respondent, there is no reason this Court could not take notice of the statute and consider the Legislature's pronouncement regarding conduct constituting "misconduct in office" in determining whether respondent committed judicial misconduct as well as the appropriate sanction.

[56] The chief judge also testified that respondent was the *only* judge who had access to the "[Secretary of State] systems" and could send information to the Secretary of State asking that "abstracts be removed."

During respondent's testimony, he reiterated that the reason he did not order a defendant to pay the costs of prosecution as part of a plea bargain was that such costs were "not authorized" by MCL 769.1f. The evidence adduced at the hearing established that this statement was a falsehood and that statutory authority was not respondent's motivating consideration in determining whether to order costs.

The assistant city attorney for the city of Jackson testified that when his office became aware that respondent was not abiding by plea agreements, it began monitoring respondent's compliance with the city's plea agreements by tracking approximately 130 cases between 2008 and 2009. The result of the monitoring revealed that of the cases surveyed in which there was no statutory authority to order the payment of costs, respondent ordered costs in 55 percent of them. The act of ordering costs in a *majority* of the cases for which there was no statutory authority to do so belies any claim that statutory authorization was respondent's foremost consideration.

Furthermore, in describing why he did not impose the costs as part of a plea agreement, respondent stated:

> And part of my problem is that, you know, I can only assess [a] total amount of so much, and if 50 or . . . 100 or $200 goes into costs of prosecution, that means, with what's going to the state, that there is not a whole lot that is going to go to the county, and, of course, the county is the one that supports the court. And it seems a challenge to me, particularly in this economic climate with a number of people that we deal with and their financial situation that I can—especially since these costs of prosecution are not related very much to the actual costs to the municipality.

During the hearing, respondent was serially impeached with dozens of cases in which he ordered the

payment of costs despite the glaring absence of statutory authority. While respondent testified that he did not remember the specific details of the cases, he did acknowledge that he ordered the payment of costs without statutory authority because (1) "there was substantial negotiation between the township prosecutor and the defense attorney," (2) he "went along" with the imposition of costs since "the defendant was willing to pay money in order to have the matter dismissed," and (3) ordering the costs of prosecution was "justified" by the "benefits" a defendant received by a favorable plea bargain. Respondent testified that there were "times" when it was "easier" to charge both court costs *and* the costs of prosecution, while in other cases it was "very hard to do that." The record reveals the following colloquy:

> *The Master*: So if I understand what you're saying, it didn't have to do with the philosophical belief or the legal standard, but it had to do with the defendant's ability to pay?
>
> *Respondent*: That was—that was a way—that was a situation where it was easier for me to go along with my fellow judges.
>
> *The Master*: Because the defendant couldn't pay?
>
> *Respondent*: Because of the fact that the defendant, if the defendant had been convicted of all of the charges and had to pay fines and costs on all of the charges, they probably would have ended up paying more than they would have paid being assessed for one count and also having to pay some costs of prosecution.
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> * * *
>
> [*The Examiner*]: . . . So if I understand your answer to the judge, despite the fact you say it's illegal on these cases, economic factors caused you to violate what you say is the law; is that correct?

> *Respondent*: Certainly my concern about where fines and costs ultimately ended up affected my—my determination, and certainly was not authorized.

Additionally, there were many cases in which respondent *did not order* payment of the costs of prosecution as part of a plea agreement, even though MCL 769.1f specifically authorizes it. Respondent testified under oath that he did not order costs in these cases because the amounts were "excessive" and therefore not "appropriate" for him to authorize. Respondent further testified that the costs of prosecution had to be "justified and documented." We conclude that these statements were also false. Respondent both ordered and failed to order costs as part of a plea agreement when the agreed-upon amounts were *identical* and failed to order the costs of prosecution when the amount contained in the plea agreement was substantially less than the amount in another. Additionally, respondent ordered costs in the complete absence of justification or documentation, contradicting any claim that costs had to be "justified and documented."

Respondent acknowledged that the Jackson city attorney would generally permit a defendant charged with operating a motor vehicle while intoxicated to plead guilty of operating a motor vehicle while visibly impaired. As part of those agreements, defendants often agreed to pay $200 for the costs of prosecution. The assistant city attorney testified that respondent failed to order costs in 78 percent of the drunk driving cases in which costs were part of the plea agreement during the relevant tracking period. Most of those cases involved costs in the amount of $200. However, in addition to failing to order costs in the amount of $200, respondent also failed to order costs when the amount in the plea agreement was much lower, such as $100 or $50. In each

case in which respondent *ordered* costs as part of an agreement reducing the charges from operating while intoxicated to operating while visibly impaired, respondent uniformly assessed costs of $200—an amount respondent's testimony indicated was "excessive." Moreover, respondent acknowledged at the hearing that he did not require *any* type of documentation or proof on those occasions when he ordered costs pursuant to a plea agreement.

Lastly, while under oath, respondent indicated that his practice of "talking to people" and dismissing their cases depended on defendants' "having actual proof that their position was right[.]" However, this was a blatantly false statement, and one need look no further than respondent's actions dismissing the tickets of his court staff, who received citations for speeding, and his spouse, who received three citations for speeding and a citation for disobeying a stop sign. Respondent's spouse and staff did not, in fact, provide "actual proof" justifying dismissal of their tickets, and respondent, by dismissing the tickets himself without a hearing, "conveniently" precluded the officers who issued the tickets and the prosecutor from offering proof of the violations. Moreover, respondent dismissed a wide variety of cases that are simply not amenable to a defendant's providing "actual proof" of innocence, including, for example, speeding or driving with a suspended license. It is unclear what "actual proof" *could* be provided under these circumstances. Even for those cases in which it *was possible* to provide "actual proof," respondent was impeached by court transcripts establishing that he dismissed cases without seeing "actual proof" of insurance.

Because the record fully supports the finding that respondent lied under oath, the appropriate sanction is

removal from office. Respondent's act of lying under oath categorically renders him unfit for office. As this Court has noted,

> [o]ur judicial system has long recognized the sanctity and importance of the oath. An oath is a significant act, establishing that the oath taker promises to be truthful. As the "focal point of the administration of justice," a judge is entrusted by the public and has the responsibility to seek truth and justice by evaluating the testimony given under oath. *When a judge lies under oath, he or she has failed to internalize one of the central standards of justice and becomes unfit to sit in judgment of others.*
>
> Certainly, Judicial Tenure Commission proceedings are intended to be remedial, not penal. The vast majority of misconduct found by the Judicial Tenure Commission is not fatal; rather, it reflects oversight or poor judgment on the part of a fallible human being who is a judge. *However, some misconduct, such as lying under oath, goes to the very core of judicial duty and demonstrates the lack of character of such a person to be entrusted with judicial privilege*.
>
> *. . . Lying under oath, as the respondent has been adjudged to have done, makes him unfit for judicial office*.[57]

Finally, we note that respondent's other acts of substantiated judicial misconduct, while quite serious, might not warrant removal from office if taken in isolation. However, the inescapable truth is that respondent's other substantiated acts of misconduct, as well as his previous disciplinary history, *are not isolated*, but are part and parcel of respondent's pervasive pattern of misconduct and his calculated disregard for the law. As the master succinctly concluded, "[r]espondent has repeatedly and intentionally demonstrated a defiant lack of respect for the

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[57] *Noecker*, 472 Mich at 17-18 (YOUNG, J., concurring) (emphasis added; citations omitted).

rule of law and the separation of powers." Respondent's clear disregard for the rule of law is incompatible with a judge's duty to uphold the law and renders him unfit for judicial office.

We order that respondent be removed from office. Additionally, pursuant to MCR 9.205(B), we order the JTC to submit a bill of costs, itemizing what costs may be attributed to the conduct or statements of respondent that permit this Court to impose "costs, fees, and expenses incurred by the [JTC] in prosecuting the complaint." Pursuant to MCR 7.317(C)(3), the clerk is directed to issue the judgment order forthwith.

MARKMAN, MARY BETH KELLY, and ZAHRA, JJ., concurred with YOUNG, C.J.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ. We concur in the result only.

ORDERS IN CASES

ORDERS ENTERED IN CASES BEFORE THE SUPREME COURT

Summary Disposition July 29, 2011:

KHAN v CITY OF FLINT, No. 142324; Court of Appeals No. 293991. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that part of the Court of Appeals judgment addressing plaintiff's federal constitutional claim. The Genesee Circuit Court correctly granted summary disposition of this claim, and we agree with that court's reasons for doing so, as stated on the record. Plaintiff's complaint makes no mention of 42 USC 1983, which is the exclusive remedy for alleged federal constitutional violations, including those pertaining to the deprivation of due process under the Fourteenth Amendment, *Monell v New York City Dep't of Social Serv*, 436 US 658, 663 (1978), nor does it allege that the injury here was caused by the city's "policy or custom," *Oklahoma City v Tuttle*, 471 US 808, 823-824 (1985). Further, plaintiff's complaint makes no mention of the federal and state "takings" clauses. Finally, plaintiff has admitted (possibly in error) that he had actual notice of the demolition, yet has undertaken no steps to set aside this admission. Therefore, we remand this case to the Genesee Circuit Court for reinstatement of the order granting summary disposition to the defendant.

MARILYN KELLY, J. (*dissenting*). I would deny leave to appeal. I believe the Court of Appeals was correct that a jury question exists in this case concerning whether plaintiff's constitutional rights were infringed.

Plaintiff was entitled to due process of law before the city demolished his property. The city was required to give him notice of the planned demolition " 'reasonably calculated, under all the circumstances, to apprise [him] of the pendency of the action and afford [him] an opportunity to present [his] objections.' "[1] Thus the two due process requirements that the city had to meet were (1) notice and (2) an opportunity to be heard. The city has acknowledged that it never gave plaintiff notice, and in fact it disciplined the employee whose responsibility it was to give him notice for neglect of her duty.

A legal fiction has allowed the city to claim that plaintiff received the notice he never had. It arose from plaintiff's failure to answer a request for admissions. The request asserted that plaintiff had timely notice of the demolition. In accordance with the court rules, the court deemed the notice admitted.

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[1] *Dusenbery v United States*, 534 US 161, 168 (2002), quoting *Mullane v Central Hanover Bank & Trust Co*, 339 US 306, 314 (1950).

The city contends that plaintiff had actual notice.[2] "Actual notice" is defined as "[n]otice given directly to, or received personally by a party."[3] What occurred in this case was at best constructive notice.[4] It did not meet the requirements of due process. I can find no caselaw, and the city identifies none, that treated constructive notice as adequate to establish actual notice and avoid the need for the opportunity for a hearing.[5] Because plaintiff was not given notice and he had no actual notice, he was never given a hearing. He was never even informed how to request a hearing.[6] If for no other reason than that the city failed to satisfy the hearing requirement of due process, it was inappropriate for the court to dispose of this case through summary disposition.

The majority believes that the case was properly dismissed because plaintiff failed to cite 42 USC 1983 in his complaint or to allege that the injury had been caused by the city's "policy or custom." But neither of these was required.[7] Moreover, plaintiff's decision not to seek to have the

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[2] The "[f]undamental requirements of due process are satisfied if a party received actual notice." *Gillie v Genesee Co Treasurer*, 277 Mich App 333, 356 n 12 (2007); *United States v Boudreau*, 564 F3d 431, 438 (CA 6, 2009).

[3] Black's Law Dictionary (8th ed), p 1090.

[4] "Constructive notice" is defined as "notice presumed by law to have been acquired by a person and thus imputed to that person." *Id*.

[5] The city cites several inapposite cases. But in each, the party had authentic actual notice. As a consequence, none of them sheds light on the type of notice that exists in this case. The cases are: *Gillie*, 277 Mich App at 354-356 (The defendant continued to send tax bills to a home owned by the plaintiff, although the plaintiff had asked the defendant to use his new out-of-state mailing address. The house ended up in foreclosure and the defendant posted a foreclosure notice on the home. The court made no finding about whether this constituted adequate notice. It simply stated the requirements for due process and that, if actual notice is found, that is sufficient for due process.); *Boudreau*, 564 F3d at 438 (The defendant was served notice in open court. Despite his assertion that this was not in compliance with the applicable statute, the court found that he had actual notice.); *West Covina v Perkins*, 525 US 234, 241 (1999) (The property owner actually knew his property had been seized, thus this was actual notice.); *Whiting v United States*, 231 F3d 70, 74 (CA 1, 2000) (Forfeiture proceedings had been discussed in the owner's presence, thus this was actual notice.); *United States v Williams*, 41 F Supp 2d 745, 747 (ND Ohio, 1998) (This case dealt only with the statutory notice requirements for federal tax liens.).

[6] *Khan v City of Flint*, unpublished opinion per curiam of the Court of Appeals, issued December 7, 2010 (Docket No. 293991), p 3.

[7] MCR 2.111(B) requires only that

admissions set aside is not grounds for refusing appellate relief. Plaintiff did not admit, even constructively, that he was provided the opportunity for a hearing.

At page 3 of the complaint, plaintiff alleged a Fifth Amendment constitutional violation. He recited the language of the amendment and asserted that defendant had "wrongfully and intentionally deprived [him] of his property without notice or a hearing." Our court rules require that a complaint set forth "allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend[.]"[8] While MCR requires that certain claims be pleaded with particularity, a § 1983 claim is not among them. And Michigan has no rule that requires a plaintiff to cite a specific statutory provision in order to state a claim.[9]

While I acknowledge that plaintiff's complaint in this case was not drafted in the most masterful fashion, it contained the minimum required information. Obviously the city was not confused about what it had to defend against. Given that it responded to plaintiff's claim with a motion to dismiss the § 1983 claim, we know that it understood what statute plaintiff relied on. In the event the city had found the complaint to be ambiguous or too vague, it could have moved under MCR 2.115(A) for a "more definite statement . . . ."[10]

In addition, it is well established that our courts look beyond mere procedural labels and read the allegations in a complaint as a whole to ascertain the nature of a claim.[11] That plaintiff stated a § 1983 claim is apparent from the fact that both lower courts analyzed it as such.

Moreover, under our court rules, a complaint is not required to assert that the city violated its "policy or custom." The complaint is not

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> [a] complaint . . . contain . . . :
>
> (1) [a] statement of facts . . . on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on the defend; and
>
> (2) [a] demand for judgment . . . .

[8] MCR 2.111(B)(1).

[9] See *Rymal v Baergen*, 262 Mich App 274, 301 n 6 (2004).

[10] MCR 2.115(A) states: "If a pleading is so vague or ambiguous that it fails to comply with the requirements of these rules, an opposing party may move for a more definite statement before filing a responsive pleading." See also *Iron Co v Sundberg, Carlson & Assoc, Inc*, 222 Mich App 120, 124-125 (1997).

[11] *Tipton v William Beaumont Hosp*, 266 Mich App 27, 33 (2005); see also *MacDonald v Barbarotto*, 161 Mich App 542, 547 (1987); *Smith v Holmes*, 54 Mich 104, 112 (1884).

designed to narrow the issues.[12] The narrowing is accomplished through "discovery, pretrial conference, and summary judgment, combined with liberal amendments to pleadings, [which] are designed to carry the burden of framing the particular issues to be tried."[13] In this case, there was an outstanding issue of fact as to whether the city violated its policy.[14]

If necessary, the trial court could have allowed plaintiff to amend the complaint. MCR 2.118(A)(2) provides that leave to amend pleadings should be freely given when justice requires it. In fact, it should be denied only for particularized reasons.[15] This Court has justified the denial of amendments for reasons such as undue delay, bad faith, repeated failure to cure deficiencies by amendment, undue prejudice, or where amendment would be futile.[16] Otherwise amendment should be freely allowed.

Summary disposition was inappropriate in this case, and the reasons the majority has given for refusing to reverse it and rejecting the Court of Appeals' decision are inconsistent with the law. For these reasons, I respectfully dissent.

HATHAWAY, J., would grant leave to appeal.

WOLFORD V PIKARSKI, No. 142805; Court of Appeals No. 295989. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion.

MARILYN KELLY, J., would grant leave to appeal.

In re SASAK, No. 143071; Court of Appeals No. 301696. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration of the issues that the respondent raises in his appeal on the merits. The appeal of right shall proceed in the Court of Appeals as if timely filed on the date of this order, and the parties shall thereafter comply with all applicable filing requirements and deadlines.

We do not retain jurisdiction.

YOUNG, C.J., and MARKMAN, J., would grant leave to appeal.

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[12] *Simonson v Mich Life Ins Co*, 37 Mich App 79, 83 (1971); *Goins v Ford Motor Co*, 131 Mich App 185, 195 (1983).

[13] *Simonson*, 37 Mich App at 83; see also *Goins*, 131 Mich App at 195.

[14] The city based its motion for summary disposition in part on its claim that it had not violated its policy about giving notice. In response, plaintiff submitted an affidavit of Councilwoman Jacqueline Poplar, which asserted that the mayor typically violated the city's policy in matters of this sort.

[15] See *Miller v Chapman Contracting*, 477 Mich 102, 105 (2007), citing *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649 (1973); see also MCR 2.118(A).

[16] *Miller*, 477 Mich at 105, citing *Ben P Fyke*, 390 Mich 649.

MARY BETH KELLY, J. (*dissenting*). I respectfully dissent from the order remanding this case to the Court of Appeals.

Following a delinquency hearing in family court, on September 22, 2010, a jury convicted respondent, age 14, of first-degree criminal sexual conduct and second-degree criminal sexual conduct arising from an incident when he was age 12. On November 10, 2010, respondent moved for a new trial or to vacate his convictions. The circuit court denied respondent's motion.

On December 17, 2010, respondent, represented by newly retained appellate counsel, filed a claim of appeal as of right in the Court of Appeals. The Court of Appeals dismissed the appeal for lack of jurisdiction. Specifically, the Court of Appeals held that respondent failed to timely file the appeal under MCR 7.204(A)(1)(a), which provides that an appeal as of right in a civil proceeding must be filed within 21 days from the time the underlying order or judgment is entered.

Respondent moved for reconsideration, and the Court of Appeals denied the motion. The Court of Appeals held that, pursuant to MCL 712A.1(2),[1] a juvenile delinquency proceeding is not classified as criminal and therefore respondent was required to comply with the 21-day deadline under MCR 7.204(A)(1)(a), as opposed to the deadline under MCR 7.204(A)(2)(c), which provides that an appeal of right in a criminal case must be brought within 42 days from the time the underlying order or judgment is entered.

Respondent seeks leave to appeal in this Court and, in my view, he raises a constitutional issue that is jurisprudentially significant. Specifically, respondent argues that under the Equal Protection Clause, he should be afforded an appeal of right under the rules governing criminal appeals. Respondent maintains that there is no basis for treating juveniles and adults convicted of the same crime differently with respect to appellate jurisdiction. Whether the classification of juveniles and adults on the basis of age for purposes of appellate jurisdiction is rationally related to a legitimate governmental interest is an issue of first impression of which the Court of Appeals gave only the most cursory treatment. Moreover, this issue is not likely to arise in the near future and resolution of the issue could impact numerous juvenile delinquency proceedings. For example, in 2010, there were 40,938 juvenile delinquency proceedings filed in this state's circuit courts.[2] Appeals from the vast majority of these proceedings are rarely brought before this Court, yet the appellate rules governing the proceedings have wide-ranging impact. Therefore, I believe it is important that this Court address the legitimate constitutional question presented by respondent and I respectfully dissent from the majority's decision otherwise.

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[1] MCL 712A.1 governs juveniles and the family division of the circuit court and it provides in pertinent part, "Except as otherwise provided, proceedings under this chapter are not criminal proceedings."

[2] Michigan Supreme Court Annual Report, 2010, p 41.

Leave to Appeal Denied July 29, 2011:

HATCHER v HATCHER, No. 141838; Court of Appeals No. 289208.The application for leave to appeal the August 19, 2010, judgment of the Court of Appeals is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court. The plaintiffs have failed to show that the defendant had a legal duty to them separate and distinct from its contractual obligations. *Fultz v Union Commerce Assoc*, 470 Mich 460, 467 (2004). Although a contracting party's assumption of contractual obligations does not extinguish or limit separately existing common-law or statutory tort duties owed to noncontracting third parties in the performance of a contract, *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157 (2011), the plaintiffs have not shown that the defendant had any such separate duty to them. The defendant, as the provider of a nondefective product to a customer, did not thereby acquire a duty to all unknown third parties who might be injured by the customer's misuse of the product.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would vacate the judgment of the Court of Appeals and remand this case to the Macomb Circuit Court for further proceedings consistent with this Court's opinion in *Loweke v Ann Arbor Ceiling & Partition Co, LLC*, 489 Mich 157 (2011).

In re DAVIS ESTATE, No. 143099; Court of Appeals No. 302742.

Leave to Appeal Denied August 5, 2011:

In re TALSO, No. 143321; Court of Appeals No. 300676.

In re GENTRY, No. 143425; Court of Appeals No. 301056.

Summary Disposition September 6, 2011:

2841 COCHRANE LLC v PEOPLES, No. 142651; Court of Appeals No. 298701. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JASEN THOMAS, No. 142822; Court of Appeals No. 301683. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals. That court shall treat the defendant's delayed application for leave to appeal as having been filed within the deadline set forth in MCR 7.205(F) and shall decide whether to grant, deny, or order other relief, in accordance with MCR 7.205(D)(2). The defendant's untimely request for appointment of counsel caused him to lose his appeal of right, but he was deprived of the opportunity to file an application for leave to appeal through the ineffective assistance of appointed counsel. See *Roe v Flores-Ortega*, 528 US 470, 477; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Peguero v United States*, 526 US 23, 28; 119 S Ct 961; 143 L Ed 2d 18 (1999).

PEOPLE v CORDARELL SIMS, No. 142868; Court of Appeals No. 292529. The motion for reconsideration of this Court's June 28, 2011, order is considered, and it is granted. On reconsideration, we modify our order dated June 28, 2011. For the reasons stated in that order, the Court of Appeals erred in ordering resentencing based on the scoring of offense variable 13 under MCL 777.43. But in addition to reversing, in part, the judgment of the Court of Appeals, we remand this case to the Court of Appeals for consideration of the issue raised by the defendant but not addressed by that court during its initial review of this case.

We do not retain jurisdiction.

Leave to Appeal Denied September 6, 2011:

PEOPLE v DUNHAM, No. 141875; Court of Appeals No. 287584.

In re SAMUEL GENTILE TRUST, Nos. 142196 and 142197; Court of Appeals Nos. 291938 and 294015.

PEOPLE v DARWICH, No. 142236; Court of Appeals No. 299740.

In re JOHN F ERVIN TESTAMENTARY TRUST, Nos. 142241, 142242, 142243, 142244, and 142245; Court of Appeals Nos. 289293, 289793, 293724, 289302, and 289861.

VECTOR ENVIRONMENTAL GROUP, INC v FIFTH THIRD BANK (MICHIGAN), No. 142295; Court of Appeals No. 290844.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MILTON BROWN, No. 142393; Court of Appeals No. 299733.

PEOPLE v JEROME WILSON, No. 142394; Court of Appeals No. 300250.

PEOPLE v BEKEIBA HOLLAND, No. 142503; Court of Appeals No. 299947.

PEOPLE v ZEBADIAH HOLLAND, No. 142505; Court of Appeals No. 299948.

PEOPLE v PHILLIPS, No. 142516; Court of Appeals No. 299205.

PEOPLE v JERRY LONG, No. 142556; Court of Appeals No. 301161.

PEOPLE v LARRY BAKER, No. 142557; Court of Appeals No. 301004.

PEOPLE v BERNARD KELLY, No. 142558; Court of Appeals No. 298250.

PEOPLE v ROBERT WALKER, No. 142564; Court of Appeals No. 299248.

PEOPLE v NEIL BENNETT, No. 142567; Court of Appeals No. 299164.

PEOPLE v POE, No. 142582; Court of Appeals No. 299537.

PEOPLE v JOBEY HENDERSON, No. 142586; Court of Appeals No. 300434.

PEOPLE v TERRY HALL, No. 142598; Court of Appeals No. 300727.

PEOPLE v CHESTER WILLIAMS, No. 142605; Court of Appeals No. 297594.

PEOPLE v WISE, No. 142607; Court of Appeals No. 299088.

PEOPLE v BLOWERS, No. 142619; Court of Appeals No. 300017.

PEOPLE v HARTGER, No. 142620; Court of Appeals No. 290723.

PEOPLE v BRUCE PARKER, No. 142622; Court of Appeals No. 301367.

PEOPLE v SANDERS, No. 142645; Court of Appeals No. 297681.

PEOPLE v MILLS, No. 142655; Court of Appeals No. 294558.

PEOPLE v RAMONE WILSON, No. 142690; Court of Appeals No. 301350.

CG AUTOMATION & FIXTURE, INC v AUTOFORM, INC, No. 142693; reported below: 291 Mich App 333.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MARY LEE, Nos. 142707 and 142708; Court of Appeals Nos. 294136 and 294137.

PEOPLE v GRAHAM, No. 142710; Court of Appeals No. 301370.

PEOPLE v ROMMEL REED, No. 142720; Court of Appeals No. 301123.

PEOPLE v PEASE, No. 142740; Court of Appeals No. 293305.

PEOPLE v MAHAFFEY, No. 142750; Court of Appeals No. 301958.

PATRIOT PUMPS LLC v JOHN E GREEN COMPANY, No. 142753; Court of Appeals No. 292919.

PEOPLE v ZAVALNITSKIY, No. 142767; Court of Appeals No. 296013.

PEOPLE v GREEN, No. 142778; Court of Appeals No. 294584.

PEOPLE v BAIN, No. 142784; Court of Appeals No. 294987.

PEOPLE v HARRISON, No. 142792; Court of Appeals No. 294828.

CAVANAGH, J., would grant leave to appeal on the offense variable 3 scoring issue for the reasons set forth in his dissenting opinion in *People v Houston*, 473 Mich 399, 410-417 (2005).

PEOPLE v ARDIS LEE, No. 142798; Court of Appeals No. 301588.

PEOPLE v HORTON, No. 142809; Court of Appeals No. 302087.

PEOPLE v WEHINGTON, No. 142818; Court of Appeals No. 301386.

PEOPLE v EARNEST HOWARD, No. 142825; Court of Appeals No. 298692.

In re APPLICATION OF CONSUMERS ENERGY COMPANY FOR RATE INCREASE, No. 142840; reported below: 291 Mich App 106.

PEOPLE v DAILEY, No. 142855; Court of Appeals No. 302176.

PEOPLE v O'NEIL, No. 142860; Court of Appeals No. 302009.

PEOPLE v KENNETH DANIELS, No. 142861; Court of Appeals No. 301587.

PEOPLE v JEFFREY TRAVIS, No. 142863; Court of Appeals No. 301704.

KRYZANOSKI v KAULE, No. 142866; Court of Appeals No. 295430.

PEOPLE v DAVID, No. 142881; Court of Appeals No. 302094.

PEOPLE v ROBERTSON, No. 142882; Court of Appeals No. 298584.

PEOPLE v RIVERO-MOSS, No. 142889; Court of Appeals No. 302028.

PEOPLE v CARICO, No. 142896; Court of Appeals No. 299319.

PEOPLE v MCDANIEL, No. 142899; Court of Appeals No. 294821.

PEOPLE v YHARBROUGH, No. 142904; Court of Appeals No. 295433.

PEOPLE v NORMAN, No. 142906; Court of Appeals No. 298603.

PEOPLE v MCCAA, No. 142908; Court of Appeals No. 298258.

PEOPLE v FRANCISCO RODRIGUEZ, No. 142909; Court of Appeals No. 301480.

PEOPLE v WOODY, No. 142912; Court of Appeals No. 301750.

PEOPLE v LEON TAYLOR , No. 142915; Court of Appeals No. 302180.

PEOPLE v MESEY, No. 142918; Court of Appeals No. 302149.

PEOPLE v LAJUAN BROWN, No. 142919; Court of Appeals No. 295867.

PEOPLE v WESLEY SIMPSON, No. 142922; Court of Appeals No. 301871.

PEOPLE v ANTHONY BAKER, No. 142932; Court of Appeals No. 301624.

PEOPLE v APOLLO JOHNSON, No. 142941; Court of Appeals No. 296708.

PEOPLE v ANTHONY PRITCHETT, No. 142942; Court of Appeals No. 302095.

WHIPPERWILL & SWEETWATER LLC v AUTO-OWNERS INSURANCE CO, No. 142943; Court of Appeals No. 295467.

PEOPLE v LEONARR MOORE, No. 142949; Court of Appeals No. 295266.

PEOPLE v BARNETT, No. 142954; Court of Appeals No. 288373.

ZIELINSKI v KALLO, No. 142960; Court of Appeals No. 295424.

PEOPLE v RANDOLPH BROWN, No. 142975; Court of Appeals No. 302300.

PEOPLE v CONERLY, No. 142986; Court of Appeals No. 291143.

PEOPLE v CARMICHAEL, No. 143007; Court of Appeals No. 296095.

BOOTH v DEPARTMENT OF CORRECTIONS, No. 143011; Court of Appeals No. 302549.

OATIS v DEPARTMENT OF CORRECTIONS, No. 143012; Court of Appeals No. 301569.

PEOPLE v FULLER, No. 143014; Court of Appeals No. 295930.

PEOPLE v CURTIS BUTLER, No. 143015; Court of Appeals No. 302474.

PEOPLE v WOODY, No. 143016; Court of Appeals No. 302555.

WILEY v CIVIL SERVICE COMMISSION, No. 143017; Court of Appeals No. 293125.

MARKMAN, J. (*concurring*). I concur with the Court's order. I write separately only to clarify that the Court of Appeals' decision did not reinstate the Civil Service Commission's final order, but instead remanded to the trial court for further proceedings. Thus, the trial court will have the opportunity to revisit this case, consider the aggravating factors relied on by respondent in light of the whole record, and once again determine whether the dismissal of petitioner was arbitrary and capricious.

PEOPLE v DERRICK JOHNSON, No. 143036; Court of Appeals No. 296222.

WHRJ LLC v CITY OF TAYLOR, No. 143047; Court of Appeals No. 295299.

HALL v BARTLETT, No. 143048; Court of Appeals No. 290147.

PEOPLE BROADEN, No. 143056; Court of Appeals No. 302841.

PEOPLE v WALLS, No. 143059; Court of Appeals No. 298033.

PEOPLE v BURWELL, No. 143073; Court of Appeals No. 302051.

PEOPLE v WITKOWSKI, No. 143077; Court of Appeals No. 297174.

PEOPLE v MCKISSACK, No. 143078; Court of Appeals No. 302189.

PEOPLE v EARNEST ROBINSON, No. 143079; Court of Appeals No. 302979.

PEOPLE v KOLBY WILLIAMS, No. 143080; Court of Appeals No. 296128.

PEOPLE v INDIA TAYLOR, No. 143081; Court of Appeals No. 303148.

PEOPLE v PAMELA LEE, No. 143082; Court of Appeals No. 302582.

TYLER v FOWLERVILLE COMMUNITY SCHOOL DISTRICT, No. 143083; Court of Appeals No. 295906.

PEOPLE v CAVASOS, No. 143090; Court of Appeals No. 302566.

PEOPLE v HAFF, No. 143093; Court of Appeals No. 302688.

PEOPLE v MONTGOMERY, No. 143094; Court of Appeals No. 295358.

PEOPLE v TESSMER, No. 143095; Court of Appeals No. 297425.

PEOPLE v MORRIS YOUNG, No. 143096; Court of Appeals No. 296214.

NEIL v SCHMOKE, No. 143100; Court of Appeals No. 294878.

PEOPLE v CRAFT, No. 143108; Court of Appeals No. 302632.

PEOPLE v WATERS, No. 143109; Court of Appeals No. 302694.

PEOPLE v WENDELL TAYLOR, No. 143110; Court of Appeals No. 302730.

PEOPLE v DANIEL BUTLER, No. 143112; Court of Appeals No. 295176.

RUDY v LINTS, No. 143115; Court of Appeals No. 293501.

PEOPLE v FOLEY, No. 143116; Court of Appeals No. 303061.

PEOPLE v RIGDEN, No. 143118; Court of Appeals No. 302970.

PEOPLE v CARSWELL, No. 143124; Court of Appeals No. 302584.

In re CONSERVATORSHIP OF SIMMONS, No. 143125; Court of Appeals No. 297232.

PEOPLE v TYREE WASHINGTON, No. 143127; Court of Appeals No. 303488.

In re GARCIA, No. 143131; Court of Appeals No. 300199.

PEOPLE v HUDSON, No. 143132; Court of Appeals No. 302578.

PEOPLE v MATTHEW REID, No. 143134; Court of Appeals No. 302988.

PEOPLE v SCHNEIDER, No. 143135; Court of Appeals No. 303844.

MOFFIT v ATTORNEY GENERAL, No. 143137; Court of Appeals No. 300706.

PEOPLE HUGULEY, No. 143140; Court of Appeals No. 296213.

PEOPLE v ALTRINGER, No. 143143; Court of Appeals No. 302811.

PEOPLE v SCOT HALL, No. 143151; Court of Appeals No. 302603.

PEOPLE v TOAL, No. 143153; Court of Appeals No. 302144.

ASPHALT SPECIALISTS, INC v STEVEN ANTHONY DEVELOPMENT COMPANY, No. 143154; Court of Appeals No. 295182.

PEOPLE v ALBERT SAUNDERS, No. 143158; Court of Appeals No. 296130.

PEOPLE v ANDERSON, No. 143172; Court of Appeals No. 296732.

PEOPLE v MARCUS WILLIAMS, Nos. 143173 and 143174; Court of Appeals Nos. 296864 and 296865.

PEOPLE v DAVID KING, No. 143182; Court of Appeals No. 294757.

PEOPLE v BIRD, No. 143186; Court of Appeals No. 297125.

PEOPLE v CLUESMAN, No. 143196; Court of Appeals No. 296808.

PEOPLE v STEELE, No. 143198; reported below: 292 Mich App 308.

PEOPLE v DWAYNE WILSON, No. 143290; Court of Appeals No. 296693.

PEOPLE v KENYA PALMER, No. 143292; Court of Appeals No. 302852.

PEOPLE v LEON WALKER, No. 143340; Court of Appeals No. 304702.

HILDEBRAND v KOCHEVAR, No. 143385; Court of Appeals No. 301160.

TUCKER v DEVEROUX, Nos. 143406 and 143407; Court of Appeals Nos. 299191 and 300257.

PEOPLE v JOHN TAYLOR, No. 143417; Court of Appeals No. 297745.

YALDO v YALDO, No. 143460; Court of Appeals No. 300701.

Superintending Control Denied September 6, 2011:

SMITH v ATTORNEY GRIEVANCE COMMISSION, No. 142995.

HANKINS v ATTORNEY GRIEVANCE COMMISSION, No. 143058.

Reconsideration Denied September 6, 2011:

PEOPLE v GAGNIER, No. 139735; Court of Appeals No. 281868. Summary disposition at 489 Mich 900.

WARD v TITAN INSURANCE COMPANY, No. 140992; reported below: 287 Mich App 552. Leave to appeal denied at 489 Mich 864.

HATHAWAY, J., would grant the motion for reconsideration.

RANDOLPH v HENRY FORD HOSPITAL, No. 141702; Court of Appeals No. 285103. Leave to appeal denied at 489 Mich 857.

MARILYN KELLY and HATHAWAY, JJ., would grant reconsideration and, on reconsideration, would grant leave to appeal.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

CIPRIANO v CIPRIANO, Nos. 141768 and 141769; reported below: 289 Mich App 361. Leave to appeal denied at 489 Mich 869.

PEOPLE v WOODMAN, No. 141813; Court of Appeals No. 297694. Leave to appeal denied at 489 Mich 858.

MARILYN KELLY, J., would grant reconsideration and, on reconsideration, would grant leave to appeal.

GET BACK UP, INC v DETROIT BOARD OF ZONING APPEALS, No. 141868; Court of Appeals No. 299190. Leave to appeal denied at 489 Mich 895.

PEOPLE v CEDRIC SIMPSON, No. 142036; Court of Appeals No. 299308. Summary disposition at 489 Mich 901.

SMITH v DOADES, No. 142144; Court of Appeals No. 291026. Leave to appeal denied at 489 Mich 896.

LUCKY ENTERPRISES, INC v HAMOOD, No. 142178; Court of Appeals No. 293632. Leave to appeal denied at 489 Mich 896.

GET BACK UP, INC v DETROIT BOARD OF ZONING APPEALS, No. 142239; Court of Appeals No. 299422. Leave to appeal denied at 489 Mich 897.

PEOPLE v KENNETH CLARK, Nos. 142259, 142260, and 142261; Court of Appeals Nos. 281460, 281461, and 281462. Leave to appeal denied at 489 Mich 897.

PEOPLE v POST, No. 142266; Court of Appeals No. 293239. Leave to appeal denied at 489 Mich 907.

In re ANDERSON ESTATE, No. 142350; Court of Appeals No. 292036. Leave to appeal denied at 489 Mich 898.

HARRINGTON v SIMPSON, No. 142546; Court of Appeals No. 294365. Leave to appeal denied at 489 Mich 964.

MARKMAN, J., would grant the motion for reconsideration and, on reconsideration, would hold this case in abeyance for *Hoffner v Lanctoe*, 489 Mich 877 (2011) (leave granted), for the reasons set forth in his dissenting statement in this case, 489 Mich 964 (2011).

EDWARDS v MCNUTT, No. 142830; Court of Appeals No. 302165. Leave to appeal denied at 489 Mich 975.

LEAPHART v CITY OF DETROIT, No. 142925; Court of Appeals No. 301016. Leave to appeal denied at 489 Mich 976.

LEAPHART v FOURMIDABLE GROUP, INC, Nos. 142927 and 142928; Court of Appeals Nos. 301288 and 301338. Leave to appeal denied at 489 Mich 976.

LUESBY v VICTOR, No. 143002; Court of Appeals No. 301290. Leave to appeal denied at 489 Mich 976.

Leave to Appeal Denied September 7, 2011:

GRIEVANCE ADMINISTRATOR v DUNCHOCK, No. 142795.

Leave to Appeal Denied September 9, 2011:

PEOPLE v SALERNO, No. 143586; Court of Appeals No. 305119.

SCOTT v DIRECTOR OF ELECTIONS, No. 143629; Court of Appeals No. 305479.

Leave to Appeal Denied September 16, 2011:

PEOPLE v TORRES-DAVID, No. 142525; Court of Appeals No. 300421.

MARILYN KELLY, J. (*concurring*). I concur in the order denying defendant's application for leave to appeal because I believe that the trial court properly scored offense variable (OV) 10 at 15 points. I write separately to point out that Justice MARKMAN, in his dissent, sadly misinterprets and misrepresents the meaning of the Court's order in this matter. Contrary to his statement, the Court does not accord greater protections in our criminal law to illegal aliens than to law-abiding citizens and legal aliens.

What the Court does is recognize that the length of a criminal's incarceration properly depends on whether his or her crime included exploitation of a vulnerable victim. Michigan law established long ago that a criminal's sentence should be longer if the criminal wronged a person knowing that the person wronged was an easy target. What happened in this case is that the defendant stole from victims who he believed would not report him because they were undocumented aliens. It is hardly an irresponsible application of justice to impose a harsher sentence on a person whose criminal activity exploits vulnerable victims than on one that does not.

The error in Justice MARKMAN's reasoning has its origins in his focus on the victims' status as undocumented aliens rather than on the offender's conduct. OV 10 involves "exploitation of a vulnerable victim."[1] It directs courts to assess 15 points for this OV if predatory conduct was involved in the defendant's crime. It defines predatory conduct as "preoffense conduct directed at a victim for the primary purpose of victimization."[2] Thus, the attention of OV 10 is on the offender's conduct and on whether that conduct was designed to make the victim easier to victimize.

The facts of this case are that defendant arranged for friends to rob the victims after learning that one victim had recently withdrawn a large sum of money from the bank. The record supports the trial court's conclusion that defendant also targeted the victims because he believed that, as undocumented aliens, they would be reluctant to report his crime to the authorities. I believe that this constituted "predatory conduct" as defined in OV 10.[3] Also, most would agree that someone who is thought to be reluctant to report a crime to the authorities is vulnerable.

Nonetheless, Justice MARKMAN concludes that the Legislature intended that undocumented aliens as a class be summarily excluded from consideration as vulnerable victims under OV 10. He enlarges the class excluded to encompass anyone who is reluctant to report being victimized to the police because he or she is not a "law-abiding citizen."[4] He apparently believes that the Legislature intended there to be such a class because it wanted crimes committed against lawbreakers less severely punished than those committed against law-abiding people.

However, Justice MARKMAN overlooks that the Legislature chose when drafting OV 10 to include drug abusers as vulnerable victims, entitled to the same protection as law-abiding people. Thus, admittedly, it intended at least some people who engage in illegal activity to be included as vulnerable victims in OV 10. The Legislature also included alcoholics. Considering these facts, I see no textual basis to infer that it intended to exclude undocumented aliens and all other "lawbreakers" reluctant to report a crime to the police from the pool of vulnerable victims.

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[1] MCL 777.40(1).

[2] MCL 777.40(3)(a).

[3] *Id*.

[4] *Post* at 865-866.

I also note that Justice MARKMAN's analysis irreconcilably conflicts with his analysis in *People v Huston*.[5] In *Huston*, writing for a majority of the Court, he concluded that the offender's conduct, not the victim's status, is dispositive for OV 10 purposes. He reasoned that an offender who lies in wait to victimize a potential victim engages in predatory conduct regardless of who is ultimately victimized.[6] That would include undocumented aliens. However, in this case, he concludes that the victims' status as undocumented aliens *precludes* a finding that they are vulnerable victims, irrespective of the offender's conduct.

Justice MARKMAN's approach creates two classes of victims: (1) undocumented aliens and lawbreakers who are reluctant to report being victimized to the police and (2) alcoholics, drug abusers, and law-abiding people. Justice MARKMAN concludes that the Legislature intended to exclude the former "as a class" from consideration as vulnerable victims, but include the latter.

Because OV 10 focuses on an offender's conduct, not on the victim's status, it punishes those who engage in criminal exploitative conduct more harshly than those who do not. If, as here, an offender robs undocumented aliens knowing that they will be less likely than others to report the crime to the police, the offender exploits that vulnerability.

I believe that undocumented aliens are vulnerable victims for purposes of OV 10 when offenders view them as easy targets because they fear contact with the police. It is for that reason that 15 points were properly assessed for OV 10. Moreover, I disagree with the Justice MARKMAN's suggestion that the delineation of specific classes of vulnerable victims in the statute leads to the inference that the Legislature intended to exclude undocumented aliens and lawbreakers who are reluctant to report crimes to the police.

Thus, I concur in the order denying leave to appeal.

MARKMAN, J. (*dissenting*). I respectfully dissent from the order denying leave to appeal. At issue is the trial court's assessment of 15 points under offense variable 10 (OV 10) of the sentencing guidelines, which pertains to the exploitation of a "vulnerable victim." MCL 777.40(1). The victims in this case were known to be illegal aliens, and the trial court reasoned that their "vulnerability" was a function of their presumed reluctance to report to the authorities criminal activities directed against them. I would reverse the trial court and order it to assess zero points for OV 10.

I do not agree that illegal alien status somehow transforms those persons into "vulnerable" victims, so that crimes committed against them are to be punished more severely than identical crimes against citizens and legal aliens. Were that to be true, it would presumably also be the case that any crime knowingly committed against another criminal would be punished more severely than an identical crime against a law-abiding citizen. I do not believe the Legislature had any intention to

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[5] *People v Huston*, 489 Mich 451 (2011).

[6] *Id*. at 463.

single out illegal aliens and subject those who commit crimes against this class of persons to *greater* punishment than those who commit crimes against any other person.

"Vulnerability" is defined in MCL 777.40(3)(c) as "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation," and MCL 777.40(1)(b) provides illustrations of covered vulnerabilities, e.g., "a victim's physical disability, mental disability, youth or agedness, or a domestic relationship . . . ." MCL 777.40(1)(c) further refers to situations in which an "offender exploit[s] a victim by his or her difference in size or strength, or both, or exploit[s] a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." These illustrations, although not exclusive, shed light on what the Legislature meant by a "vulnerable victim," and illegal alien status, in my judgment, is in no way even remotely similar to these illustrations. It is hardly a "vulnerability" akin to a physical or mental disability, or analogous to youth or agedness, that as a result of his victimization an illegal alien may be rendered more likely to come into contact with law enforcement authorities or more likely to be held accountable for his lawbreaking. Only a highly strained and unreasonable reading of MCL 777.40 would equate these "vulnerabilities."

Finally, Justice MARILYN KELLY entirely misapprehends my analysis. I do not believe that illegal aliens are "a class [to] be summarily excluded from consideration as vulnerable victims . . . ." Rather, if the "vulnerability" of an illegal alien is that of any other person, e.g., if the illegal alien suffers from a physical disability or is the victim of "predatory conduct," a criminal perpetrator who has victimized an illegal alien will be subject to having points assessed under OV 10 on the same basis as a criminal perpetrator victimizing any other person. See *People v Huston*, 489 Mich 451 (2011). I simply do not believe, as does Justice KELLY, that illegal alien status *alone* transforms a person into a "vulnerable victim." Indeed, I do not believe that *any* person's reluctance to come into contact with law enforcement authorities—because that person is himself an ongoing lawbreaker or a fugitive from justice, for example—should be considered a "vulnerability" for purposes of OV 10, whether that person is a citizen, a legal alien, or an illegal alien. Crimes committed against persons who are lawbreakers, and therefore reluctant to engage law enforcement authorities, should be treated with severity *equal* to that for crimes committed against persons who are not lawbreakers, but there is no reasonable basis in the law for treating crimes against persons who are lawbreakers with *greater* severity.

To the extent that criminal punishments deter lawbreakers, and to the extent that greater punishments deter more than do lesser punishments, the majority today establishes in the law of our state the remarkable proposition that persons known to be illegal aliens will be accorded under our criminal law *greater* protections from lawbreakers than will law-abiding citizens and legal aliens. It is a proposition with which I disagree and that I cannot support.

MARY BETH KELLY and ZAHRA, JJ., joined the statement of MARKMAN, J.

Statements Regarding Decisions on Motion for Disqualification Entered September 16, 2011:

MCCARTHY v SOSNICK, Nos. 142461 and 142462; Court of Appeals Nos. 300159 and 300160.

YOUNG, C.J. Plaintiff has come to regard disqualification motions as a weapon of choice when he fails to obtain the judicial outcome he wants. He has unsuccessfully moved multiple times for my removal and that of other members of this and other courts. As is this one, all of plaintiff's previous disqualification motions were without legal merit or factual support and, in a word, frivolous.

On this occasion, plaintiff has moved for my disqualification, along with the disqualification of my other six colleagues on the Court and the retroactive disqualification of a former colleague. He claims (again without support) that all of us are personally biased against him. Plaintiff also claims that I am personally biased for the Department of Human Services (DHS), a state agency that is not even a party in this case, and that my participation in this case raises an appearance of impropriety.

Any claim that I am personally biased against plaintiff or for the DHS is categorically untrue and wholly without basis in fact. Any claim that my participation in this case raises an appearance of impropriety is also categorically untrue and wholly without basis in fact.

Therefore, I deny plaintiff's motion for my disqualification.

CAVANAGH, J. I deny the motion for disqualification for the reasons stated in this Court's order of January 13, 2011, in *McCarthy v Sosnick*, 488 Mich 1030 (2011).

MARILYN KELLY, J. Plaintiff has moved for my disqualification. Plaintiff has failed to substantiate any basis for my recusal. Because I have no actual bias and there is no appearance of impropriety, nor do any other grounds exist for my disqualification, I deny plaintiff's motion.

MARKMAN, J. Plaintiff has moved for my disqualification, along with that of all other justices on the Court and even one former justice. Plaintiff has failed to substantiate any basis for my recusal in this case. Because I have no actual bias and there is no appearance of impropriety, and because no other grounds exist in support of my disqualification, I deny plaintiff's motion to disqualify me.

HATHAWAY, J. Plaintiff has moved for my disqualification. However, plaintiff has failed to substantiate any basis for my recusal. Because I have no actual bias and there is no appearance of impropriety, nor do any other grounds exist supporting my disqualification, I deny plaintiff's motion.

MARY BETH KELLY, J. Plaintiff has moved for my disqualification. Plaintiff has failed to substantiate any basis for my recusal. Because I have no actual bias and there is no appearance of impropriety, nor do any other grounds exist for my disqualification, I deny plaintiff's motion.

ZAHRA, J. Plaintiff has moved for my disqualification, along with that of all other justices on the Court and one former justice who would not, under any procedural circumstance, be in a position to rule on plaintiff's case. Plaintiff has failed to substantiate any basis for my recusal. Because

I have no actual bias and there is no appearance of impropriety, nor do any other grounds exist for my disqualification, I deny plaintiff's motion.

Rehearing Denied September 20, 2011:

PEOPLE v KOWALSKI, No. 141695. Reported at 489 Mich 488.

Summary Disposition September 21, 2011:

HISSONG v BRYCE, No. 142910; Court of Appeals No. 294956. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Wexford Circuit Court for reconsideration of the defendants' motion for sanctions pursuant to MCR 2.114(D), (E), and (F) and MCL 600.2591. On remand, if the circuit court again assesses sanctions, we direct the court to determine whether the plaintiffs' cocounsel at the time of the defendants' motion for summary disposition—James P. O'Neill and Robert Charles Davis—should be held jointly and severally liable for the assessment, along with the plaintiffs and their former attorney, Mark R. Dancer.

We do not retain jurisdiction.

PEOPLE v WRIGHT, No. 143120; Court of Appeals No. 297192. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The prosecutor did not move to dismiss the case, and the order of dismissal states that the dismissal was "on motion of the court." We remand this case to the Court of Appeals for consideration of the issues raised by the prosecutor but not addressed by that court during its initial review of this case.

MARILYN KELLY, J., would deny leave to appeal.

PEOPLE v GIOGLIO, No. 143136; reported below: 292 Mich App 173. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. For the reasons stated in the Court of Appeals dissenting opinion, *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), does not apply to defense counsel's performance in this case. We remand this case to the Court of Appeals for consideration of whether defense counsel's performance was ineffective under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984), and the remaining issue raised by the defendant but not addressed by that court during its initial review of this case.

We do not retain jurisdiction.

Leave to Appeal Granted September 21, 2011:

TITAN INSURANCE COMPANY v HYTEN, No. 142774; reported below: 291 Mich App 445. The parties shall include among the issues to be briefed whether an insurance carrier may reform an insurance policy on the

ground of misrepresentation in the application for insurance where the misrepresentation is "easily ascertainable" and the claimant is an injured third party.

The motion for leave to file brief amicus curiae is granted. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

SPECTRUM HEALTH HOSPITALS v FARM BUREAU INSURANCE COMPANY OF MICHIGAN, No. 142874; Court of Appeals No. 296976. The parties shall address whether an immediate family member who knows that he or she has been forbidden to drive a vehicle may nevertheless be a permissive user of the vehicle eligible for personal protection insurance (PIP) benefits under MCL 500.3113(a) when, contrary to the owner's prohibition, an intermediate permissive user grants the PIP claimant permission to operate the accident vehicle.

The motion of the Insurance Institute of Michigan to file a brief amicus curiae is granted. The Michigan Association for Justice, the Michigan Insurance Federation, the Michigan Defense Trial Counsel, Inc., the Michigan Health and Hospital Association, and the Commissioner of the Office of Financial and Insurance Regulation are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issue presented may move the Court for permission to file briefs amicus curiae.

PEOPLE v COLE, No. 143046; Court of Appeals No. 298893. The parties shall address (1) whether MCR 6.302 requires that a defendant pleading guilty or no contest to first-degree or second-degree criminal sexual conduct must be informed that he or she will be subject to lifetime electronic monitoring if the victim is under 13 years of age and the defendant is sentenced to prison and (2) whether lifetime electronic monitoring must be included in the terms of a sentence evaluation under *People v Cobbs*, 443 Mich 276 (1993).

The Prosecuting Attorneys Association of Michigan and the Criminal Defense Attorneys of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PROGRESSIVE MARATHON INSURANCE COMPANY v DEYOUNG, No. 143330; Court of Appeals No. 296502. The parties shall address (1) whether an immediate family member who knows that he or she has been forbidden to drive a vehicle, and has been named in the no-fault insurance policy applicable to the vehicle as an excluded driver, but who nevertheless operates the vehicle and sustains personal injury in an accident while doing so, comes within the so-called "family joyriding exception" to MCL 500.3113(a); and (2) if so, whether the "family joyriding exception" should be limited or overruled.

The Michigan Association for Justice, the Michigan Insurance Federation, Michigan Defense Trial Counsel, Inc., the Michigan Health and Hospital Association, and the Commissioner of the Office of Financial

and Insurance Regulation are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 21, 2011:

DEFRAIN V STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 142956; reported below: 291 Mich App 713. At oral argument, the parties shall address whether this case is controlled by *Jackson v State Farm Mut Auto Ins Co*, 472 Mich 942 (2005), and whether the 30-day notice requirement regarding hit-and-run accidents in the defendant's policy is enforceable without a showing of prejudice to the defendant due to the claimant's failure to comply with the provision. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied September 21, 2011:

PEOPLE V DENDEL, No. 141708; reported below: 289 Mich App 445.
MARILYN KELLY, J., would grant leave to appeal.

YACKISH V STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 142754; Court of Appeals No. 289671.
CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE V RUELAS, No. 142857; Court of Appeals No. 300565.

PEOPLE V DEANGELO THOMAS, No. 142980; Court of Appeals No. 298522.

DURALL V HOME-OWNERS INSURANCE COMPANY, No. 143037; Court of Appeals No. 293910.
MARILYN KELLY and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE V HINES, No. 143043; Court of Appeals No. 295863.

PEOPLE V STINCHCOMB, No. 143044; Court of Appeals No. 294783.
CAVANAGH and MARILYN KELLY, JJ., would grant leave to appeal.

Summary Disposition September 23, 2011:

PEOPLE V MUNGO, No. 141160; reported below: 288 Mich App 167. By order of October 29, 2010, we granted leave to appeal the April 13, 2010, judgment of the Court of Appeals. By order of April 5, 2011, this case was held in abeyance pending the decision in *Davis v United States*, cert gtd 562 US ___; 131 S Ct 502; 178 L Ed 2d 368 (2010). On order of the Court, the case having been decided on June 16, 2011, *Davis v United States*, 564 US ___; 131 S Ct 2419; 180 L Ed 2d 285 (2011), we vacate our October 29, 2010, order that granted leave to appeal, we vacate the Court of Appeals

judgment of April 13, 2010, and we remand this case to the Court of Appeals for reconsideration in light of *Davis*. The motion to file supplemental authority is denied as moot.

We do not retain jurisdiction.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

MARSACK v SALENS, No. 143328; Court of Appeals No. 291153. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration. The Court of Appeals' opinion states, "Contrary to the argument raised by the personal representative, MCL 600.5852 is not a statute of limitations. Rather, MCL 600.5852 is a saving provision and an exception to the statute of limitations." *Marsack v Salens*, unpublished opinion per curiam of the Court of Appeals, issued May 24, 2011 (Docket No. 291153), p. 4. The Court of Appeals' opinion further states, "Consequently, the personal representative did not meet her burden of establishing that MCL 600.5852 applied." *Id*. Contrary to those statements, the personal representative, who is the defendant, did not argue that MCL 600.5852 is a statute of limitations or that it applies in this case. Rather, the personal representative argued that MCL 600.5852 does not apply in this case. Because the judgment of the Court of Appeals was based on an apparent misunderstanding of the parties' arguments, we direct the Court of Appeals to reconsider its decision in light of the arguments actually made by the parties.

We do not retain jurisdiction.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 23, 2011:

ADMIRE v AUTO-OWNERS INSURANCE COMPANY, No. 142842; Court of Appeals No. 289080. At oral argument, the parties shall address whether, or to what extent, the defendant is obligated to pay the plaintiff personal protection insurance benefits under the no-fault act, MCL 500.3101 et seq., for handicap-accessible transportation. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Summary Disposition September 26, 2011:

PEOPLE v FRANKLIN, No. 141062; Court of Appeals No. 296591. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v SWORD, No. 142553; Court of Appeals No. 301169. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted of the question whether lifetime monitoring was authorized in this case, as part of the defendant's sentence, where the complainant was 14 years old. In all other respects, leave to appeal is denied.

PEOPLE v JAMERSON, No. 143206; Court of Appeals No. 303507. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied September 26, 2011:

NEW START, INC v ALLSTATE INSURANCE COMPANY, No. 142030; Court of Appeals No. 296809.

PEOPLE v SPAGNOTTI, No. 142184; Court of Appeals No. 300545.

GRIESBACH v ROSS, No. 142258; reported below: 291 Mich App 295.

CAVANAGH, J., would grant the application for leave to appeal and the application for leave to appeal as cross-appellant.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v KEY, No. 142276; Court of Appeals No. 299958.

PEOPLE v DESAI, No. 142294; Court of Appeals No. 294287.

BENNETT v SINAI HOSPITAL OF GREATER DETROIT, No. 142414; Court of Appeals No. 291036.

PEOPLE v HORAN, No. 142484; Court of Appeals No. 292422.

PEOPLE v ROBERT JOHNSON, No. 142570; Court of Appeals No. 300871.

PEOPLE v LARRY SMITH, No. 142656; Court of Appeals No. 300869.

PEOPLE v CLEVELAND ROGERS, No. 142663; Court of Appeals No. 298070.

EWI WORLDWIDE, INC v LIFESTYLE RETAIL PARTNERS, No. 142684; Court of Appeals No. 295167.

PEOPLE v WILLIAMSON, No. 142719; Court of Appeals No. 300664.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v JERMOND PERRY, No. 142737; Court of Appeals No. 294223.

PEOPLE v SEWELL, No. 142761; Court of Appeals No. 295021.

PEOPLE v JASPER, No. 142775; Court of Appeals No. 294496.

PEOPLE v DERRICK OLIVER, No. 142790; Court of Appeals No. 293148.

PEOPLE v MEECHEE MORRIS, No. 142802; Court of Appeals No. 294652.

PEOPLE v CINNAMON, No. 142846; Court of Appeals No. 302237.

POULOS v GENESYS REGIONAL MEDICAL CENTER, No. 142935; Court of Appeals No. 299514.

PEOPLE v SHAYKIN, No. 142952; Court of Appeals No. 295883.

PEOPLE v HUDGINS, No. 142953; Court of Appeals No. 299536.

GOLDEN GATEWAY PROPERTIES v DIVERSIFIED RESTAURANT ENTERPRISES, No. 142955; Court of Appeals No. 299266.

WOODCARE X, INC v DEPARTMENT OF COMMUNITY HEALTH, No. 142974; Court of Appeals No. 294824.

GORE v BELCHER, No. 142988; Court of Appeals No. 294157.

PEOPLE v MARK BALL, No. 142993; Court of Appeals No. 295851.

STERN v MARJIEH, No. 143010; Court of Appeals No. 295487.

PEOPLE v HARDER, No. 143050; Court of Appeals No. 302279.

PEOPLE v BROXTON, No. 143051; Court of Appeals No. 301630.

PEOPLE v OSBY, No. 143055; reported below: 291 Mich App 412.

PEOPLE v GASHI, No. 143070; Court of Appeals No. 302520.

NAKASH v KHAN, No. 143102; Court of Appeals No. 299802.

PEOPLE v CHARLES BROOKS, No. 143103; Court of Appeals No. 302689.

WOOD v HOLIDAY, No. 143104; Court of Appeals No. 295031.

MEEMIC INSURANCE COMPANY v DTE ENERGY COMPANY, Nos. 143106 and 143107; reported below: 292 Mich App 278.

PEOPLE v BURG, No. 143111; Court of Appeals No. 303166.

PEOPLE v MAKULSKI, No. 143129; Court of Appeals No. 303154.

PEOPLE v SUTTON, No. 143130; Court of Appeals No. 296144.

BENINATI CONTRACTING SERVICES, INC v VIP COMPANY, No. 143138; Court of Appeals No. 296218.

PEOPLE v DARRYL JOHNSON, No. 143139; Court of Appeals No. 295980.

PEOPLE v REGINALD TAYLOR, No. 143144; Court of Appeals No. 302980.

PEOPLE v CALHOUN, No. 143147; Court of Appeals No. 302847.

PEOPLE v NATHANIEL HAMILTON, No. 143149; Court of Appeals No. 302983.

PEOPLE v ROBERT HOWARD, No. 143155; Court of Appeals No. 301673.

POPE v BRINKS HOME SECURITY COMPANY, Nos. 143159 and 143160; Court of Appeals Nos. 294600 and 294609.

PEOPLE v JAMES SMITH, No. 143163; Court of Appeals No. 295258.

RAY v DEPARTMENT OF CORRECTIONS, No. 143165; Court of Appeals No. 300646.

PEOPLE v CRAIG, No. 143168; Court of Appeals No. 302076.

McCOLE v INDUSTRIAL FINISHING TECHNOLOGIES, INC, No. 143183; Court of Appeals No. 294362.

WOODARD v FORD MOTOR COMPANY, No. 143184; Court of Appeals No. 299850.

PEOPLE v JAMES WALKER, No. 143187; Court of Appeals No. 289323.

PEOPLE v DESHAWN FOSTER, No. 143188; Court of Appeals No. 303293.

PEOPLE v GOOD, No. 143189; Court of Appeals No. 302063.

MANSOUR v MANSOUR, No. 143192; Court of Appeals No. 295717.

DUPRAS v LLOYD-LEE, No. 143193; Court of Appeals No. 295130.

PEOPLE v JASON CLARK, No. 143197; Court of Appeals No. 293581.

PEOPLE v FISHER, No. 143200; Court of Appeals No. 295322.

PEOPLE OF THE CITY OF RIVERVIEW v TOWLE, No. 143201; Court of Appeals No. 295885.

PEOPLE v CAROLYN CURRY, No. 143203; Court of Appeals No. 292730.

PEOPLE v DALE PRICE, No. 143205; Court of Appeals No. 303082.

PEOPLE v EDWARDS, No. 143208; Court of Appeals No. 296127.

PEOPLE v NEDROW, No. 143211; Court of Appeals No. 297166.

TERRY v OFFICE OF FINANCIAL AND INSURANCE REGULATION, No. 143212; Court of Appeals No. 295470.

GREAT LAKES SOCIETY v GEORGETOWN TOWNSHIP, Nos. 143213 and 143214; Court of Appeals Nos. 296370 and 296372.

PEOPLE v ALDRIDGE, NO. 143216; Court of Appeals No. 295864.

PEOPLE v WEAVER, No. 143220; Court of Appeals No. 303119.

PEOPLE v CLEVELAND, No. 143222; Court of Appeals No. 296296.

BROOKSHIRE ESTATE v STIER, Nos. 143224 and 143225; Court of Appeals Nos. 291186 and 292991.

MICHIGAN PIPE AND VALVE-LANSING, INC v HEBELER ENTERPRISES, INC, No. 143231; reported below: 292 Mich App 479.

DIXON v HUDSONVILLE TRUCK AND TRAILER SERVICE COMPANY, No. 143232; Court of Appeals No. 296948.

PEOPLE v KENNEDY, No. 143241; Court of Appeals No. 303591.

PEOPLE v RONALD McLEAN, No. 143242; Court of Appeals No. 302854.

PEOPLE v JOSEPH WHITE, No. 143246; Court of Appeals No. 300987.

PEOPLE v MOSLEY, No. 143247; Court of Appeals No. 296269.

PEOPLE v VENEGAR, No. 143250; Court of Appeals No. 297165.

PEOPLE v HENRY, No. 143253; Court of Appeals No. 296943. CAVANAGH, J., would grant leave to appeal.

BROOKSHIRE ESTATE v STIER, No. 143256; Court of Appeals No. 291186.

PEOPLE v LITCHARD, No. 143257; Court of Appeals No. 303713.

PEOPLE v LAWRENCE, No. 143260; Court of Appeals No. 303295.

SUMPTER v DEPARTMENT OF CORRECTIONS, No. 143261; Court of Appeals No. 301689.

PEOPLE v RANSOM, No. 143264; Court of Appeals No. 295357.

PEOPLE v DAVARRIO WEBB, No. 143267; Court of Appeals No. 303212.

MULARCZYK v DAMICO CONTRACTING, INC, No. 143282; Court of Appeals No. 300784.

PEOPLE v PETTY, No. 143283; Court of Appeals No. 303633.

PEOPLE v PRIM, No. 143289; Court of Appeals No. 303740.

PEOPLE v NAJER, No. 143299; Court of Appeals No. 296322.

PEOPLE v THAYER, No. 143309; Court of Appeals No. 303757.

ANDRUS v CITY OF SOUTHGATE, No. 143323; Court of Appeals No. 296417.

PEOPLE v BIRGE, No. 143324; Court of Appeals No. 303270.

PEOPLE v WETHERELL, No. 143332; Court of Appeals No. 303562.

PEOPLE v MCDONALD, No. 143349; Court of Appeals No. 303453.

PEOPLE v HAROLD JOHNSON, No. 143368; Court of Appeals No. 302183.

PEOPLE v CIAVONE, No. 143441; Court of Appeals No. 300905.

Superintending Control Denied September 26, 2011:

CARTER v ATTORNEY GRIEVANCE COMMISSION, No. 143238.

Reconsideration Denied September 26, 2011:

PEOPLE v TIGHE, No. 141573; Court of Appeals No. 287731. Leave to appeal denied at 489 Mich 971.

PEOPLE v BLANKS, No. 141914; Court of Appeals No. 255257. Leave to appeal denied at 489 Mich 971.

PEOPLE v RONALD SPANGLER, No. 142361; Court of Appeals No. 292728. Leave to appeal denied at 489 Mich 972.

PEOPLE v MICHAEL DAVIS, No. 142416; Court of Appeals No. 298318. Leave to appeal denied at 489 Mich 990.

PEOPLE v GARY MORRIS, No. 142419; Court of Appeals No. 298096. Leave to appeal denied at 489 Mich 990.

PEOPLE v THEODORE BELL, No. 142493; Court of Appeals No. 301422. Leave to appeal denied at 489 Mich 933.

PEOPLE v NEWKIRK, No. 142529; Court of Appeals No. 301155. Leave to appeal denied at 489 Mich 934.

PEOPLE v BRIDINGER, No. 142549; Court of Appeals No. 294616. Leave to appeal denied at 489 Mich 982.

PEOPLE v BELCHER, No. 142585; Court of Appeals No. 293599. Leave to appeal denied at 489 Mich 935.

PEOPLE v ROACH, No. 142788; Court of Appeals No. 294356. Leave to appeal denied at 489 Mich 985.

MARILYN KELLY, J., would grant reconsideration.

PEOPLE v ANTHONY OLIVER, No. 142895; Court of Appeals No. 302630. Summary disposition at 489 Mich 923.

PEOPLE v FREDERICK, No. 142940; Court of Appeals No. 295091. Leave to appeal denied at 489 Mich 993.

Summary Disposition September 28, 2011:

PEOPLE v HARRINGTON, No. 142958; Court of Appeals No. 302167. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Saginaw Circuit Court. The court articulated a substantial and compelling reason for departing from the sentencing guidelines when imposing a sentence following a probation violation, but it failed to articulate any rationale to justify imposition of the longest possible minimum sentence. *People v Smith*, 482 Mich 292 (2008). On remand, the court shall either issue an order that articulates why this level of departure is warranted or resentence the defendant. In all other respects, leave to appeal is denied.

We do not retain jurisdiction.

ADAIR v GENERAL MOTORS CORPORATION, No. 142996; Court of Appeals No. 299978. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted of the issue raised by the defendant in its application to this Court, namely whether MCL 418.373(1) applies to the plaintiff in this case.

Leave to Appeal Granted September 28, 2011:

MICHIGAN PROPERTIES LLC v MERIDIAN TOWNSHIP, Nos. 143085, 143086, and 143087; reported below: 292 Mich App 147. The parties shall include among the issues to be briefed whether the failure of the taxing authority's assessor to adjust the taxable value of real property in the year immediately after a transfer of the property in accordance with MCL 211.27a(3) precludes the board of review from adjusting the taxable value in a later year.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

TOLL NORTHVILLE LIMITED PARTNERSHIP v NORTHVILLE TOWNSHIP, No. 143281; reported below: 293 Mich App 1. The application for leave to appeal the May 31, 2011, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether the Court of Appeals correctly held that the Michigan Tax Tribunal had no jurisdiction to reduce an unconstitutional increase in the taxable value of property if the improperly increased taxable value was not challenged in the year of the increase.

The motion of the Michigan Association of Realtors for leave to file a brief amicus curiae is granted. Other persons or groups interested in the determination of this issue may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered September 28, 2011:

RESIDENTIAL FUNDING CO, LLC v SAURMAN and BANK OF NEW YORK TRUST COMPANY v MESSNER, Nos. 143178 and 143179; reported below: 292 Mich App 321. At oral argument, the parties shall address whether Mortgage Electronic Registration Systems, Inc. (MERS) as the mortgagee and nominee of the note holder is an "owner . . . of an interest in the indebtedness secured by the mortgage" within the meaning of MCL 600.3204(1)(d), such that it was permitted to foreclose by advertisement. The parties may file supplemental briefs no later than October 21, 2011. They should not submit mere restatements of their application papers.

The motions of the Michigan Association of Realtors, Legal Services Association of Michigan/Michigan Poverty Law Program/State Bar of Michigan Consumer Law Section Council/National Consumer Law Center, State Bar of Michigan Real Property Law Section, Mortgage Electronic Registration Systems, Inc./Mortgage Bankers Association, Michigan Bankers Association/Michigan Mortgage Lenders Association, and the American Land Title Association for leave to file briefs amicus curiae are granted. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae, to be filed no later than October 21, 2011.

Leave to Appeal Denied September 28, 2011:

PEOPLE v KENNETH THOMAS, No. 142579; Court of Appeals No. 294789.

CAVANAGH, J., would grant leave to appeal.

HANSEN v DEPARTMENT OF COMMUNITY HEALTH, No. 142692; Court of Appeals No. 294415.

PEOPLE v PURNELL, No. 142736; Court of Appeals No. 301716.

COMMUNITY RESOURCE CONSULTANTS, INC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 142905; Court of Appeals No. 293932.

PEOPLE v JARVIS, No. 142923; Court of Appeals No. 295444.

SPARTECH POLYCOM v CITY OF ST. CLAIR, No. 142937; Court of Appeals No. 295334.

ALCONA COUNTY v MICHIGAN MUNICIPAL LEAGUE LIABILITY & PROPERTY POOL, No. 142957; Court of Appeals No. 292155.

PEOPLE v HARPER, No. 143210; Court of Appeals No. 302122.

Superintending Control Denied September 28, 2011:

LAMKIN v JUDICIAL TENURE COMMISSION, No. 142888. The complaint for superintending control is considered, and it is dismissed for the reason that there is no "proceeding" before the Judicial Tenure Commission within the meaning of MCR 9.203(C).

Leave to Appeal Denied September 30, 2011:

YOHN v UNIVERSITY OF MICHIGAN REGENTS, No. 142894; Court of Appeals No. 294135. On its own motion, the Court concludes that the plaintiff-appellant's application for leave to appeal is frivolous. As a sanction, the plaintiff-appellant is ordered to pay the clerk of this Court $1,000 within 28 days of the date of this order.

ATTORNEY GENERAL v MERCK SHARP & DOHME CORPORATION, No. 142989; reported below: 292 Mich App 1.

CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

MARILYN KELLY, J. (*dissenting*). I dissent from the Court's order denying plaintiffs' application for leave to appeal. Because the Court of Appeals clearly erred in holding that plaintiffs' suit is a product liability action and thus barred by MCL 600.2946(5), I would reverse its decision and reinstate plaintiffs' claim.

The facts of this case are straightforward. The case involves a controversy surrounding the sale of Vioxx, a pain-relief drug manufactured by defendant Merck Corporation. Merck withdrew Vioxx from the market after clinical trials revealed that persons using the drug experienced an increased risk of heart attack.

In 2008, the Michigan Attorney General filed suit under Michigan's Medicaid False Claim Act[1] seeking recovery of approximately $20 million in payments the state made for Vioxx prescriptions written on behalf of Medicaid recipients. Plaintiffs alleged that defendant knowingly made false and deceptive statements about the safety and efficacy of Vioxx in order to enhance its sales. They claimed that, in doing so, defendant duped the state into paying for those prescriptions.

Defendant sought summary disposition, alleging that it was protected from product liability exposure for drugs approved by the United States Food and Drug Administration. The trial court denied its motion, ruling that plaintiffs' action did not sound in product liability. In a split decision, the Court of Appeals reversed that decision, holding that plaintiffs' suit was a product liability action, meaning that it falls within the exemption for liability in MCL 600.2946(5).[2]

On appeal to this Court, plaintiffs argue that the Court of Appeals misconstrued their lawsuit. Specifically, they contend that a claim brought under the Medicaid False Claim Act is not a product liability action barred by MCL 600.2946(5)[3] because it is not a claim seeking compensation for "damage to property" as used in the act. Rather, it is a claim seeking the return of payments procured through fraudulent conduct. I agree with plaintiffs.

MCL 600.2945(h) defines a "product liability action" as "an action based on a legal or equitable theory of liability brought for the death of a person or for injury to a person or damage to property caused by or resulting from the production of a product." The Court of Appeals majority held that plaintiffs' allegations fall within this statutory definition because they assert legal and equitable theories of liability for damage to property resulting from the production of a product. Essentially, the court held that plaintiffs' alleged financial damages in the form of payments to Medicare patients amount to "damage to property." This defies common sense and a rational understanding of the statutory phrase "damage to property."

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[1] MCL 400.601 *et seq*.

[2] *Attorney General v Merck Sharp & Dohme Corp*, 292 Mich App 1 (2011).

[3] MCL 600.2946(5) provides, in pertinent part:

> In a product liability action against a manufacturer or seller, a product that is a drug is not defective or unreasonably dangerous, and the manufacturer or seller is not liable, if the drug was approved for safety and efficacy by the United States food and drug administration . . . . This subsection does not apply if the defendant at any time before the event that allegedly caused the injury does any of the following:
>
> (a) Intentionally withholds from or misrepresents to the United States food and drug administration information concerning the drug . . . .

In interpreting statutes, "[t]he fair and natural import of the provision governs, considering the subject matter of the entire statute."[4] As dissenting Court of Appeals Judge FITZGERALD noted, "[w]hen examined in the proper context of a products-liability statute, it is clear that 'damage to property' means *physical* damage to property caused by a defective or unreasonably dangerous product."[5] Here, the damages alleged by plaintiffs arise from an injury to the state's Medicaid program and represent an amount of money wrongfully paid to defendant. No physical damage is involved.

Moreover, MCL 600.2945(5) applies to a lawsuit by a purchaser, user, or bystander of a product. Indeed, the definitions of "misuse" and "sophisticated user" in MCL 600.2945(e) and (j) contemplate that the *user* of a product will be a potential plaintiff in a product liability action. By contrast, in this case, the state of Michigan brought suit for the return of Medicaid payments. Thus, this is not a suit brought by a user of a product for "damage to property" as contemplated by MCL 600.2945(5). Accordingly, that statute does not provide immunity for defendant.

A simple example clarifies the mistake made by the Court of Appeals majority. Product liability cases are generally brought by or on behalf of people who have suffered injury or damage to their physical property because of the use of a product. Hence, if a customer buys a product and it burns down his or her house, that person may bring a product liability action. However, if that same customer buys a product, such as fireworks, with the expectation that it will blow up, and it does not work as promised, no product liability action lies.

The latter hypothetical situation is analogous to the instant case. Plaintiffs are attempting to recover money spent for a product that allegedly did not live up to defendant's representations. This case is not a product liability action because no physical injury is claimed. Whether plaintiffs' action ultimately has merit is unknown at this stage of the proceedings, but defendant is not entitled to the immunity conferred by MCL 600.2946(5).

The judgment of the Court of Appeals should be reversed.

PEOPLE v OLEAR, No. 143177; Court of Appeals No. 297155.

MARILYN KELLY, J. (*concurring*). I concur with the order denying leave to appeal. The Court of Appeals correctly vacated defendant's probation sentence and remanded for resentencing. However, in light of the Court of Appeals' disposition, the majority's comments regarding the trial court's bases for imposing a downward departure sentence are dicta. Moreover, they are inaccurate. As Judge MURRAY's partial dissenting opinion observed, some of the factors that the majority finds inappropriate are appropriate considerations for the trial court.[1]

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[4] *People v McGraw*, 484 Mich 120, 124 (2009).

[5] *Merck Sharp*, 292 Mich App at 20 (FITZGERALD, J., dissenting).

[1] See *People v Daniel*, 462 Mich 1, 7 (2000); *People v Fields*, 448 Mich 58, 77 (1995).

I agree with Judge MURRAY that the majority attempted to "place handcuffs on the trial court's decision on remand . . . ."[2] The more prudent action would have been to refrain from addressing the issue.

VEREEN v MANNING, No. 143487; Court of Appeals No. 303710.

In re GOANS, No. 143709; Court of Appeals No. 301934.

In re DEFOUR-GRAVES, No. 143748; Court of Appeals No. 302815.

Summary Disposition October 5, 2011:

PEOPLE v JOBSON, No. 143035; Court of Appeals No. 302124. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the defendant's sentence. Zero points should be scored for prior record variable (PRV) 7 because the Court of Appeals vacated the defendant's concurrent conviction for possession of child sexually abusive materials. The resulting change in the defendant's total PRV score produces a lower guidelines range, and the defendant is thus entitled to resentencing. See *People v Francisco*, 474 Mich 82 (2006). Therefore, we remand this case to the Tuscola Circuit Court for resentencing under properly scored sentencing guidelines. In all other respects, leave to appeal is denied.

We do not retain jurisdiction.

RAMCO HARTLAND LLC v LANDMARK/MANSOUR DEVELOPMENT LLC, No. 143113; Court of Appeals No. 294877. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court for entry of an amended order clarifying that the dismissal of the counterclaim for breach of contract was without prejudice, in view of the fact that the court concluded that the claim was premature. In all other respects, leave to appeal is denied.

In re ROBINSON, Nos. 143274 and 143275; Court of Appeals Nos. 300648 and 300779. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. We agree with the Court of Appeals' conclusion that clear and convincing evidence supported the statutory grounds for termination at the initial dispositional hearing. MCL 712A.19b(3)(i), (j), and (*l*). Both respondents demonstrate prolonged histories of instability. Respondent mother has had her parental rights to five other children terminated, has failed to benefit from prior services, and has a history of mental health problems with questionable treatment compliance. Respondent father has a conviction for criminal sexual conduct with a minor, is on probation for drug trafficking, and suffers from chronic unemployment.

Although respondents have made attempts to improve their circumstances, the Court of Appeals erred by reversing the trial court's finding that termination was in the child's best interests under MCL

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[2] *People v Olear*, unpublished opinion per curiam of the Court of Appeals, issued April 21, 2011 (Docket No. 297155) (MURRAY, J., concurring in part and dissenting in part).

712A.19b(5). As the Court of Appeals partial dissent recognized, the parties' only very recent efforts at improvement do not demonstrate "a sufficient or maintained improvement in their abilities or situations given their prolonged history of problems to suggest . . . that it would not be in the child's best interest to terminate their parental rights." *In re Robinson*, unpublished opinion per curiam of the Court of Appeals, issued May 26, 2011 (Docket Nos. 300648 and 300779) (TALBOT, J., concurring in part and dissenting in part), p 2. Petitioner points out that the Legislature's 2008 amendment of MCL 712A.19b(5), which deleted the word "clearly" from the statute, suggests that a different burden of proof and standard of review is applicable to the best interests determination. However, regardless of the burden of proof or standard of review that is applied, the evidence overwhelmingly supports termination. Accordingly, we reinstate the order of the St. Clair Circuit Court, Family Division, terminating both respondents' parental rights.

CAVANAGH, J., concurred in the result only.

Leave to Appeal Denied October 5, 2011:

PEOPLE v SMOOT, No. 141457; Court of Appeals No. 289540.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v FULTON, No. 142920; Court of Appeals No. 296114.

MARILYN KELLY, J., would grant leave to appeal.

PRIME FINANCIAL SERVICES LLC v VINTON, No. 142931; Court of Appeals No. 290735.

CAVANAGH and HATHAWAY, JJ., would grant leave to appeal.

PEOPLE v MICHAEL JONES, No. 143003; Court of Appeals No. 302301.

PEOPLE v DOSS, No. 143038; Court of Appeals No. 29551.

MANIKA v LAPCZYNSKI, No. 143054; Court of Appeals No. 299141.

HATHAWAY, J., would grant leave to appeal.

BAUMAN v BOTTLING GROUP LLC, No. 143105; Court of Appeals No. 300181.

MARILYN KELLY, J., would grant leave to appeal.

RAMCO HARTLAND LLC v LANDMARK/MANSOUR DEVELOPMENT LLC, No. 143101; Court of Appeals No. 294890.

PEOPLE v JEFFRIES, No. 143150; Court of Appeals No. 295406.

SIORAKES v TARGET CORPORATION, No. 143199; Court of Appeals No. 295034.

YOUNG, C.J., and MARKMAN, J., would grant leave to appeal.

PEOPLE v ANDRE JACKSON, No. 143221; reported below: 292 Mich App 583.

PEOPLE v CULLENS, No. 143243; Court of Appeals No. 296492.

MARILYN KELLY, J., would reverse the May 4, 2011, order of the Court of Appeals that denied the defendant's motion for leave to file a pro se reply brief.

JOHNSON v ABRAMS, No. 143251; Court of Appeals No. 287906.

WELLS FARGO BANK v HINES-FLAGG, No. 143252; Court of Appeals No. 302193.

Reconsideration Denied October 5, 2011:

PECORARO v ROSTAGNO-WALLAT, Nos. 142686 and 142687; reported below: 291 Mich App 303. Leave to appeal denied at 489 Mich 951. The motion for reconsideration of this Court's June 3, 2011 order is considered, and it is denied, there being no majority in favor of granting reconsideration.

CAVANAGH and HATHAWAY, JJ., would grant reconsideration and, on reconsideration, would grant leave to appeal.

MARILYN KELLY, J., would grant reconsideration and, on reconsideration, would grant leave to appeal for the reasons set forth in her dissenting statement in this case, 489 Mich 951 (2011).

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

Leave to Appeal Denied October 7, 2011:

MATTER v MATTER, No. 142682; Court of Appeals No. 293421.

MARILYN KELLY, J. (*dissenting*). I dissent from the Court's order denying plaintiff's application for leave to appeal and would reverse the Court of Appeals' decision. I agree with the dissenting opinion of that court, which would have affirmed the circuit court's decision. The circuit court held an extensive evidentiary hearing and determined that defendant's gross income for the purpose of calculating his spousal support includes certain amounts he treated as investment or passive income. It granted plaintiff's motion for an increase in spousal support, but the Court of Appeals reversed that decision.

The underlying facts are as follows. Soon after the parties' divorce, defendant left his employment as an oncologist at a large Michigan hospital and relocated to Kentucky where he took employment with United Surgical Associates PSC (USA). He soon chose to become a shareholder of USA. This required him to purchase shares in USA's captive medical equipment affiliate, Radiation Oncology Associates, PLLC (ROA). His employment included work for another USA affiliate, United Radiation Oncology (URO), which operates cancer treatment centers and uses ROA's medical equipment to treat USA's cancer patients.

Under the terms of the parties' judgment of divorce, plaintiff's spousal support is a percentage of defendant's gross earnings. The earnings comprised income from defendant's employer and from Premier

Radiation Oncology Services P.C. The latter was a captive affiliate of defendant's employer, and the income it generated was "passive interest or investment income."

While in Michigan, defendant's average annual income was $390,000. In 2006-2007, his first year in Kentucky, defendant asserted that the income subject to his spousal support obligation was $374,805. But his W-2 reported income of $466,174. Defendant claimed that the difference between his W-2 income and his salary came from returns on his investments in USA and ROA, a sum of roughly $90,000. And, he claimed that the amount of spousal support he should pay must be based solely on his salary. He viewed it irrelevant that the base used in Michigan included income from his investment in a captive affiliate corporation of his employer there.

The circuit court disagreed and ruled that his divorce settlement contemplated that the income reported on his W-2 was defendant's income for the purposes of calculating his spousal support obligation. The court pointed out, in addition, that the language of the Michigan Child Support Formula supports its position. The formula would interpret defendant's income as his "earnings generated from a business, partnership, contract, self-employment, or other similar arrangement or from rentals," and additionally include "interest, [and] dividends . . . to the extent that they represent income or may be used to generate regular income." MCSF 2.01(C)(2) and (5).

The circuit court reasoned that defendant realized the return on his investment in ROA and URO solely as a result of his employment. Consequently, that income was part of his gross earnings from his employment. Additionally, the court found that defendant did not act in good faith in leaving his employment in Michigan. His move to Kentucky stripped plaintiff of her interest in his supplemental employee retirement plan.

However, the Court of Appeals majority found the divorce judgment unambiguous and held that the plain language of the parties' agreement excluded consideration of defendant's investment income from USA and ROA. It also held that defendant did not breach the implied covenant of good faith and fair dealing, because he did not violate any of the terms of the parties' settlement agreement.

The Court of Appeals majority failed to grasp the equitable nature of spousal support. It also failed to recognize the ambiguity in the settlement agreement and incorrectly applied a de novo standard of review. I agree with the Court of Appeals dissent that this case should have been reviewed for clear error. Had that standard been applied, the judgment would not have been found to be clearly erroneous, for the reasons stated in both the Court of Appeals dissenting opinion and the circuit court's opinion.

The circuit court determined that, for purposes of the judgment, the definition of "investment income" was not the same as the definition used in the Internal Revenue Code. The proper analysis must take its guidance from the child support formula. Using that guide, it is apparent that defendant's income included the gains from his employment and labor while working with URO. The income

accumulated from ROA and URO was not passive investment income, especially given the relationship between those captive affiliates. Defendant's income increased as the number of patients he treated at URO increased the number of patients using ROA's equipment.

Additionally, the machinations that defendant employed to avoid the classification of this income as gross income beg for the application of equitable principles by the circuit court. Plaintiff claimed in the trial court, and defendant has yet to rebut, that defendant represented during the divorce proceedings that he would continue to work at the Michigan hospital. Plaintiff was unaware when the settlement agreement was written that defendant would terminate that employment just two months after the judgment of divorce was entered. Defendant led her to believe that her rights to defendant's unvested supplemental employee retirement plan with the Michigan hospital were secure.

The application of equitable principles, always appropriate in domestic relations matters, requires a different result under the facts of this case than the Court of Appeals reached. I would reverse the Court of Appeals decision.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

In re FURCRON, No. 143717; Court of Appeals No. 300717.

Statement Regarding Decision on Motion for Disqualification Entered October 7, 2011:

In re EXECUTIVE MESSAGE OF THE GOVERNOR (BROWN V GOVERNOR), No. 143563.

MARKMAN, J. Plaintiffs have moved for my disqualification on the basis of my wife's participation in another case, *Police & Fire Retirement Sys of the City of Detroit v Snyder*, No. 2:11-cv-11686-SFC-LJM (ED Mich), and specifically on the grounds that a provision of law, 2011 PA 4, is at issue in both cases. In *Snyder*, my wife made an appearance on behalf of the Attorney General, and assisted in preparing and arguing a procedural motion to dismiss, which raised no substantive issues concerning 2011 PA 4, before withdrawing as counsel in order, according to the Attorney General, to "avoid any further distractions in this file."

MCR 2.003 provides in pertinent part that disqualification is warranted where:

> (g) The judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> * * *
>
> (ii) is acting as a lawyer in the proceeding;
>
> (iii) is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding.

No grounds for my disqualification are present in this case. My wife is not, and has never, "act[ed] as a lawyer in the proceeding" before this Court. Indeed, she has never had anything to do with the instant proceeding. Nor can it be said that she has "more than a de minimis interest that could be substantially affected by the proceeding." Apart from the fact that she is no longer even involved in *Snyder*, her compensation is wholly unaffected by whether the Attorney General's Office does or does not prevail, in *Snyder*, much less in the instant case, and the financial viability of the Attorney General's Office is wholly unaffected by whether it does or does not prevail, in *Snyder*, much less in the instant case. See *Adair v Michigan*, 474 Mich 1027, 1036-1037 (2006) (statement of TAYLOR, C.J., and MARKMAN, J.). That a ruling by this Court might conceivably have an impact upon another case in which my wife has previously been involved, as it also might conceivably have an impact upon cases in which any one of 35,000 attorneys in Michigan is, or has been, involved, is a natural and probable result of *any* decision of this Court. Such a potential impact, however, has never before been viewed as a basis for disqualification by any judge of this Court, or by any judge of any other court of which I am aware. Most significantly, such disqualification is not required by a court rule in which disqualification in light of family relationships is specifically addressed.

Finally, there is nothing else in regard to this case that causes me to believe that I cannot be fair-minded and even-handed in my exercise of judgment in deciding the constitutional issues involved. Accordingly, plaintiffs' motion for my disqualification is respectfully denied.

Leave to Appeal Denied October 14, 2011:

MUELLER V SEARS ROEBUCK & COMPANY, No. 143018; Court of Appeals No. 300346.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

In re COLLINS, No. 143775; Court of Appeals No. 300227.

Statements Regarding Decision on Motion for Disqualification Entered October 18, 2011:

MCCARTHY V SCOFIELD, No. 143785; Court of Appeals No. 300921.

YOUNG, C.J. Plaintiff has filed yet another motion in his efforts to disqualify me. There are no new grounds asserted in his latest motion that have not already been asserted. I deny plaintiff's motion for disqualification for the reasons stated in my September 16, 2011, statement in *McCarthy v Sosnick*, 490 Mich 867 (2011).

CAVANAGH, J. Plaintiff has moved for my disqualification. I deny plaintiff's motion for disqualification for the reasons stated in my September 16, 2011, statement in *McCarthy v Sosnick*, 490 Mich 867 (2011).

MARILYN KELLY, J. Plaintiff has moved for my disqualification. I deny plaintiff's motion for disqualification for the reasons stated in my September 16, 2011, statement in *McCarthy v Sosnick*, 490 Mich 867 (2011).

MARKMAN, J. This is to deny plaintiff's motion for my disqualification for the reasons set forth in my statement of September 16, 2011, in *McCarthy v Sosnick*, 490 Mich 867 (2011).

HATHAWAY, J. Plaintiff has moved for my disqualification. I deny plaintiff's motion for disqualification for the reasons stated in my September 16, 2011, statement in *McCarthy v Sosnick*, 490 Mich 867 (2011).

Leave to Appeal Granted October 19, 2011:

PEOPLE v VAUGHN, No. 142627; reported below: 291 Mich App 183. The application for leave to appeal the December 28, 2010 judgment of the Court of Appeals is considered, and it is granted, limited to the issues: (1) whether the defendant was denied his right to a public trial pursuant to US Const, Am VI, and Const 1963, art 1, § 20, where the Wayne Circuit Court excluded persons other than jurors from the courtroom during the jury voir dire, see *Presley v Georgia*, 558 US 209; 130 S Ct 721; 175 L Ed 2d 675 (2010); (2) whether the defendant, by failing to object, forfeited or waived any error resulting from the exclusion of the public from the courtroom during the jury voir dire, and, if so, whether trial counsel rendered ineffective assistance in failing to object; (3) whether, if some structural errors can be forfeited, the denial of the right to a public trial is among those forfeitable errors; and (4) whether the defendant is entitled to a new trial as a consequence of the trial court's exclusion of the public during the jury voir dire.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

BOERTMANN v CINCINNATI INSURANCE COMPANY, No. 142936; reported below: 291 Mich App 683. The parties shall address whether a no-fault insured who sustains psychological injury producing physical symptoms as a result of witnessing the fatal injury of a family member in an automobile accident while not an occupant of the vehicle involved is entitled under MCL 500.3105(1) to recover benefits for accidental bodily injury arising out of the ownership, operation, maintenance or use of a motor vehicle as a motor vehicle.

The Michigan Association for Justice, Michigan Defense Trial Counsel, Inc., the Commissioner of the Office of Financial and Insurance Regulation, and the Negligence Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Summary Disposition October 19, 2011:

HICKS V AUTO CLUB GROUP INSURANCE COMPANY, No. 143234; Court of Appeals No. 295391. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Court of Appeals for consideration of the issues raised by the defendant but not addressed by that court during its initial review of this case. The motion to strike is denied.

Reconsideration Granted October 19, 2011:

PEOPLE V JACOBS, No. 142519; Court of Appeals No. 283056. Leave to appeal denied at 489 Mich 958. We vacate our order dated June 22, 2011. On reconsideration, the application for leave to appeal the December 7, 2010, judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(H)(1), in light of the parties' stipulation that the defendant is entitled to a new trial, we vacate the judgment of the Court of Appeals and remand this case to the Wayne Circuit Court for a new trial.

Leave to Appeal Denied October 19, 2011:

In re JACK E CRANE TRUST, No. 142424; Court of Appeals No. 293006.

PEOPLE V GRESHAM, No. 142763; Court of Appeals No. 293580.

MARILYN KELLY, J., would grant leave to appeal.

JACKIMOWICZ V CITIZENS INSURANCE COMPANY OF AMERICA, No. 143145; Court of Appeals No. 294472.

PEOPLE V BRANDON MITCHELL, No. 143171; Court of Appeals No. 299480.

BONDIE V RUBERT, No. 143215; Court of Appeals No. 295832.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal to consider the expert testimony issue and the constitutionality of MCL 600.2169.

MOVSISYAN V IPAX CLEANOGEL, INC, No. 143262; Court of Appeals No. 299235.

OEGEMA V BELL, No. 143454; Court of Appeals No. 298114.

Summary Disposition October 20, 2011:

SCOTT V DIRECTOR OF ELECTIONS, No. 143878; Court of Appeals No. 306155. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the order of the Court of Appeals, and we reinstate the September 16, 2011, order of the Ingham Circuit Court that denied plaintiff's motion for a preliminary injunction. The circuit court did not abuse its discretion in denying plaintiff's motion for a preliminary

injunction. It is not clear that plaintiff is likely to prevail on the merits. See *Detroit Fire Fighters Ass'n v Detroit*, 482 Mich 18, 34 (2008). The motion for stay is denied as moot.

In a different election controversy 40 years ago, this Court recognized the practical problems that can arise when legal issues are brought to the appellate courts too close to the election day. In an effort to achieve "better timing of appeals to the judicial process," this Court suggested that appellate review of election-related legal issues would be facilitated if the party seeking review filed its papers "*in this Court*," despite the absence of an explicit rule authorizing the same. *Carman v Secretary of State*, 384 Mich 443, 449 (1971). In this regard, MCR 7.302(C)(1)(b) now authorizes the filing of an application for leave to appeal in this Court before a decision by the Court of Appeals after an application for leave to appeal has been filed in the Court of Appeals. We encourage future litigants in election disputes to avail themselves of this provision, where appropriate.

We further note that the October 6, 2011, order of the Court of Appeals, and the manner in which that court treated that order, unfortunately created confusion and uncertainty for the parties, the Ingham Circuit Court, and the public. The order is ambiguous as to whether the Court of Appeals retained jurisdiction. It appears to resolve the only issue before that court by reversing the circuit court order denying a preliminary injunction, and yet it refers to granting the application, but does so without guidance to the parties as to how to proceed, and does not state that the Court of Appeals retained jurisdiction. Indeed, the circuit judge contacted the Court of Appeals for clarification of whether the underlying case continued before him (where a summary disposition motion going to the merits of the underlying and significant legal question had already been filed) or was within the jurisdiction of the Court of Appeals. In responding, the Court of Appeals inappropriately orally added to its written order a specific deadline within which the circuit judge should act. The circuit judge understandably found himself compelled to issue the injunction sought by plaintiff, and equally understandably questioned why the Court of Appeals had not itself enjoined the election in light of its stated ruling that the circuit court had erred in determining that plaintiff had not shown that he was likely to prevail on the merits of a first-impression issue. Nor does the order suggest that the Court of Appeals will give the matter expedited consideration in a case with extreme time constraints and that involves the constitutional right to recall an elected state representative, Const 1963, art 2, § 8, in which more than 11,000 citizens had already signed recall petitions. Finally, to compound the confusion, the Court of Appeals docket, as of October 19, 2011, indicates that the case has been concluded. To clarify any confusion, the Court of Appeals case in Docket No. 306155 is closed. This order is to take immediate effect. We do not retain jurisdiction.

Summary Disposition October 21, 2011:

YOUNG v NANDI, No. 143237; Court of Appeals No. 292409. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that

part of the Court of Appeals' judgment finding that the plaintiff is entitled to attorney fees and costs for posttrial work that occurred in the Oakland Circuit Court following the appellate process, and we reinstate the circuit court's ruling in this regard. There is not a sufficient causal nexus between the postappeal proceedings and the defendants' rejection of the case evaluation. MCR 2.403(O)(6)(b); *Haliw v Sterling Hts*, 471 Mich 700, 711 n 8 (2005). In all other respects, the application for leave to appeal and the application for leave to appeal as cross-appellant are denied. We remand this case to the Oakland Circuit Court for proceedings consistent with this order and the remand ordered by the Court of Appeals.

CAVANAGH and MARILYN KELLY, JJ., would grant the application for leave to appeal and the application for leave to appeal as cross-appellant.

HATHAWAY, J., would simply deny leave to appeal.

Summary Disposition October 24, 2011:

PEOPLE v RANDALL BELL, No. 141340; Court of Appeals No. 296712. By order of September 27, 2010, the application for leave to appeal the May 10, 2010 order of the Court of Appeals was held in abeyance pending the decision in *People v Dowdy* (Docket No. 140603). On order of the Court, the case having been decided on July 11, 2011, 489 Mich 373 (2011), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the district court's order dismissing the charges. Even if the defendant was homeless, he was obligated to advise law enforcement officers within 10 days after he changed or vacated his previously registered residence or domicile. *Dowdy*, 489 Mich at 381. Homelessness does not prevent a sex offender from complying with the notification obligation pursuant to MCL 28.725(1) because every person must have a legal domicile or, for practical purposes, because the Michigan State Police has promulgated an order to accommodate homeless sex offenders for the purposes of registration. *Dowdy*, 489 Mich at 386-387. The trial court therefore erred in concluding that the homeless defendant was not statutorily mandated to register "something." We remand this case to the 12th District Court for reinstatement of the charges against the defendant and for further proceedings consistent with this order.

CAVANAGH, J., would grant leave to appeal.

MARILYN KELLY, J., would grant leave to appeal to reconsider *People v Dowdy*, 489 Mich 373 (2011).

HOFFMAN v BARRETT, No. 141407; reported below: 288 Mich App 536. By order of November 22, 2010, the application for leave to appeal the June 3, 2010, judgment of the Court of Appeals was held in abeyance pending the decisions in *Ligons v Crittenton Hosp* (Docket No. 139978) and *Green v Pierson* (Docket No. 140808).

On order of the Court, the application for leave to appeal in *Green v Pierson* having been denied on March 18, 2011, 489 Mich 854 (2011), and the case of *Ligons v Crittenton Hosp* having been decided on July 29, 2011, 490 Mich 61 (2011), the application is again considered and, pursuant to MCR 7.302(H), in lieu of granting leave to appeal, we vacate

the Court of Appeals' opinion and remand this case to that court for reconsideration in light of this Court's decision in *Ligons*.

CAVANAGH, J., dissented for the reasons set forth in his dissenting opinion in *Ligons v Crittendon Hosp*, 490 Mich 61, 90-97 (2011).

MARILYN KELLY, J., would grant leave to appeal to reconsider *Ligons v Crittendon Hosp*, 490 Mich 61 (2011).

PEOPLE v PAUL FARQUHARSON, No. 141761; Court of Appeals No. 289071. By order of December 16, 2010, the application for leave to appeal the July 22, 2010, judgment of the Court of Appeals was held in abeyance pending the decision in *People v Dowdy* (Docket No. 140603). On order of the Court, the case having been decided on July 11, 2011, 489 Mich 373 (2011), the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and remand this case to the Court of Appeals for reconsideration in light of *Dowdy*.

CAVANAGH, J., would grant leave to appeal.

MARILYN KELLY, J., would grant leave to appeal to reconsider *People v Dowdy*, 489 Mich 373 (2011).

PEOPLE v AMANDA BALL, No. 143360; Court of Appeals No. 303727. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

MIDWEST MEMORIAL GROUP v CITIGROUP GLOBAL MARKETS, INC, No. 143387; Court of Appeals No. 301883. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

MIDWEST MEMORIAL GROUP v CITIGROUP GLOBAL MARKETS, INC, No. 143448; Court of Appeals No. 301861. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied October 24, 2011:

MICHIGAN FIRST CREDIT UNION v AL LONG FORD, INC, No. 142501; Court of Appeals No. 291146.

PEOPLE v LEON ANDERSON, No. 142580; Court of Appeals No. 293859.

MARILYN KELLY, J., would grant leave to appeal to reconsider *People v Huston*, 489 Mich 451 (2011).

PEOPLE v CALVIN OWENS, No. 142666; Court of Appeals No. 297783.

MURPHY v PUBLIC SCHOOL EMPLOYEES' RETIREMENT SYSTEM, No. 142745; Court of Appeals No. 298607.

PEOPLE v BROADNAX, No. 142829; Court of Appeals No. 302753.

PEOPLE v LOPP, No. 142916; Court of Appeals No. 295662.

PEOPLE v BLOCKSOM, No. 142985; Court of Appeals No. 301533.

MIDWEST MEMORIAL GROUP v CITIGROUP GLOBAL MARKETS, INC, No. 142999; Court of Appeals No. 301964.

ROBINSON v FORD MOTOR COMPANY, No. 143009; Court of Appeals No. 290824.

PEOPLE v CLAYTON, No. 143024; Court of Appeals No. 293983.

CLEVELAND v STATE EMPLOYEES' RETIREMENT BOARD, No. 143039; Court of Appeals No. 294852.

PEOPLE v SCHRAM, Nos. 143061, 143062, 143063, 143064, 143065, and 143066; Court of Appeals Nos. 302754, 302765, 302788, 302793, 302796, and 302804.

SCOTT v ZIMMERMAN, No. 143126; Court of Appeals No. 296077.

PEOPLE v ROMEL JOHNSON, No. 143141; Court of Appeals No. 302718.

PEOPLE v ANTWUAN CROSS, No. 143146; Court of Appeals No. 301613.

HIEBER v WASHTENAW COMMUNITY COLLEGE, No. 143162; Court of Appeals No. 303314.

PEOPLE v MACON, No. 143167; Court of Appeals No. 302218.

PEOPLE v TATE, No. 143170; Court of Appeals No. 294858.

PEOPLE v LINDSAY, No. 143190; Court of Appeals No. 296201.

PEOPLE v MASON, No 143194; Court of Appeals No. 295402.

PEOPLE v WINSTON, No. 143195; Court of Appeals No. 295140.

PEOPLE v TIERNEY, No. 143229; Court of Appeals No. 302372.

PEOPLE v ARTHUR COOK, No. 143245; Court of Appeals No. 303276.

PEOPLE v SZYDLEK, No. 143248; Court of Appeals No. 294567.

BEAUDETTE v AUTO-OWNERS INSURANCE COMPANY, No. 143255; Court of Appeals No. 295939.

PEOPLE v HURST, No. 143259; Court of Appeals No. 303313.

VAN ELSLANDER v THOMAS SEBOLD AND ASSOCIATES, INC, No. 143263; Court of Appeals No. 299703.

PEOPLE v ORLANDO ROBINSON, No. 143278; Court of Appeals No. 296565.

PEOPLE v HUNTINGTON, No. 143279; Court of Appeals No. 295474.

GRIEVANCE ADMINISTRATOR v KRAFT, No. 143280.

PEOPLE v CASTILLO, No. 143291; Court of Appeals No. 294354.

PEOPLE v TROY HAYNES, No. 143295; Court of Appeals No. 303327.

PEOPLE v THOMAS JOHNSON, No. 143297; Court of Appeals No. 296459.

PEOPLE v CORRION, No. 143300; Court of Appeals No. 303925.

SOHAL v MICHIGAN STATE UNIVERSITY BOARD OF TRUSTEES, No. 143303; Court of Appeals No. 295557.

TROWBRIDGE v FLOWERS, No. 143310; Court of Appeals No. 301263.

PEOPLE v LEONARDROW SMITH, No. 143312; Court of Appeals No. 297164.

PEOPLE v HALLOCK, No. 143316; Court of Appeals No. 303126.

PEOPLE v XAYSANA, No. 143322; Court of Appeals No. 295712.

PEOPLE v DOWNEY, No. 143333; Court of Appeals No. 303760.

PEOPLE v KISSNER, No. 143334; reported below: 292 Mich App 526.

BHAMA v STATE EMPLOYEES' RETIREMENT SYSTEM, No. 143336; Court of Appeals No. 300333.

PEOPLE v ROGER ROBERTS, No. 143338; reported below: 292 Mich App 492.

PEOPLE v KLEINTRALL LEE, No. 143341; Court of Appeals No. 303315.

PEOPLE v RUSSELL JONES, No. 143350; Court of Appeals No. 303709.

PEOPLE v ANTONIO VASQUEZ, No. 143351; Court of Appeals No. 297755.

PEOPLE v HEWLETT, No. 143352; Court of Appeals No. 296044.

PRESTON v DEPARTMENT OF TREASURY, No. 143353; reported below: 292 Mich App 728.

PEOPLE v ATCHINSON, No. 143355; Court of Appeals No. 302634.

PEOPLE v MICHAEL WHITE, No. 143356; Court of Appeals No. 297204.

PEOPLE v JOHN DAVIS, No. 143359; Court of Appeals No. 295267.

PEOPLE v LOUIS, No. 143361; Court of Appeals No. 303561.

PEOPLE v MARSEE, No. 143364; Court of Appeals No. 295023.

GJASHTA v C & D SUPPLY COMPANY, INC, No. 143365; Court of Appeals No. 300456.

PEOPLE v BRANDON MOORE, No. 143369; Court of Appeals No. 303662.

PEOPLE v PECKHAM, No. 143370; Court of Appeals No. 303347.

MICHIGAN FIRST CREDIT UNION v SMITH, No. 143371; Court of Appeals No. 296670.

PEOPLE v CHANDLER, No. 143372; Court of Appeals No. 303617.

PEOPLE v JEROME MATTHEWS, No. 143377; Court of Appeals No. 303676.

PEOPLE v SHAFFER, No. 143379; Court of Appeals No. 303583.

PEOPLE v SMITHERS, No. 143381; Court of Appeals No. 303759.

PEOPLE v HOLMES, No. 143382; Court of Appeals No. 296263.

SCHMITT v JAGUAR/LAND ROVER OF MACOMB, No. 143388; Court of Appeals No. 297562.

PEOPLE v QUINTANA, No. 143389; Court of Appeals No. 295324.

PEOPLE v XIONG, No. 143390; Court of Appeals No. 297285.

PEOPLE v BENTON, No. 143396; Court of Appeals No. 303423.

PEOPLE v WILLIE SMITH, No. 143397; Court of Appeals No. 303411.

PEOPLE v PEA, No. 143402; Court of Appeals No. 297592.

PEOPLE v PROEHL, No. 143405; Court of Appeals No. 296111.

PEOPLE v KOVARY, No. 143409; Court of Appeals No. 297255.

PEOPLE v RYAN SMITH, No. 143426; Court of Appeals No. 303756.

PEOPLE v ROMANDO LEWIS, No. 143427; Court of Appeals No. 296730.

PEOPLE v KOTT, No. 143430; Court of Appeals No. 303946.

PEOPLE v APPLING, No. 143433; Court of Appeals No. 303669.

PEOPLE v MENGEL, No. 143436; Court of Appeals No. 303634.

PEOPLE v BURTS, No. 143439; Court of Appeals No. 303474.

PEOPLE v GARRETT, No. 143446; Court of Appeals No. 304302.

TROYER POTATO PRODUCTS, INC v OAKLEY, No. 143450; Court of Appeals No. 292666.

PEOPLE v STRICKLAND, No. 143456; Court of Appeals No. 303796.

PEOPLE v LASTON, No. 143459; Court of Appeals No. 296566.

PEOPLE v VERBEKE, No. 143464; Court of Appeals No. 303825.

PEOPLE v JOVAN HAMILTON, No. 143466; Court of Appeals No. 304088.

PEOPLE v LATINA TAYLOR, No. 143472; Court of Appeals No. 296901.

PEOPLE v MASTERS, No. 143476; Court of Appeals No. 303612.

PEOPLE v PHILLIP WILSON, No. 143477; Court of Appeals No. 303894.

PEOPLE v KIDD, No. 143478; Court of Appeals No. 297244.

PEOPLE v TERESA WILSON, No. 143486; Court of Appeals No. 300294.

PEOPLE v KYLE ANDERSON, No. 143491; Court of Appeals No. 303100.

PEOPLE v GAINOUS, No. 143501; Court of Appeals No. 303889.

OAKLAND COUNTY PROSECUTOR'S OFFICE v BARR, No. 143508; Court of Appeals No. 296743.

PEOPLE v WILLOBEE, No. 143515; Court of Appeals No. 303890.

PEOPLE v ABBEY, No. 143518; Court of Appeals No. 304080.

ROBERTS v SAFFELL, No. 143537; Court of Appeals No. 295500.

PEOPLE v MARK WHITE, No. 143557; Court of Appeals No. 297914.

PEOPLE v PATRICIA ROBERTS, No. 143558; Court of Appeals No. 294631.

PEOPLE v ANGELO WILLIAMS, No. 143591; Court of Appeals No. 296211.

CROTEAU v AUTO-OWNERS INSURANCE COMPANY, No. 143596; Court of Appeals No. 303030.

In re REINSTATEMENT PETITION OF WIGGINS, No. 143691.

Superintending Control Denied October 24, 2011:

AWAD v ATTORNEY GRIEVANCE COMMISSION, No. 143449.

Reconsideration Denied October 24, 2011:

TERLIKOWSKI v PINSON, No. 141908; Court of Appeals No. 296555. Leave to appeal denied at 489 Mich 979.

MARKMAN, J., would grant reconsideration and, on reconsideration, would remand this case to the Court of Appeals for consideration as on leave granted.

NOBLE v OFFICE OF THE RACING COMMISSIONER, No. 142102; Court of Appeals No. 292080. Leave to appeal denied at 489 Mich 930.

MARILYN KELLY, J., would grant reconsideration and, on reconsideration, would grant leave to appeal.

PEOPLE v JURECKI, No. 142366; Court of Appeals No. 300514. Leave to appeal denied at 489 Mich 972.

PEOPLE v ALFIERO, No. 142426; Court of Appeals No. 299561. Leave to appeal denied at 489 Mich 990.

JAKUPOVIC v CITY OF HAMTRAMCK, No. 142436; Court of Appeals No. 293715. Summary disposition at 489 Mich 939.

MARILYN KELLY, J., would grant reconsideration and, on reconsideration, would grant leave to appeal.

HATHAWAY, J., would grant plaintiff's motion for reconsideration.

PEOPLE v LAWRENCE PARKER, No. 142845; Court of Appeals No. 302202. Leave to appeal denied at 489 Mich 976.

PEOPLE v JOSEPH ANDERSON, No. 142964; Court of Appeals No. 302803. Leave to appeal denied at 489 Mich 976.

PEOPLE v ANTHONY ADAMS, No. 142972; Court of Appeals No. 301468. Leave to appeal denied at 489 Mich 992.

HANKINS v ATTORNEY GRIEVANCE COMMISSION, No. 143058. Leave to appeal denied at 490 Mich 862.

PEOPLE v MCWILLIAMS, No. 143119; Court of Appeals No. 301504. Leave to appeal denied at 489 Mich 994.

HILDEBRAND v KOCHEVAR, No. 143385; Court of Appeals No. 301160. Leave to appeal denied at 490 Mich 862.

Leave to Appeal Granted October 26, 2011:

In re MORTIMORE ESTATE, No. 143307; Court of Appeals No. 297280. The parties shall address what standards should apply and what factors a court should consider in determining whether a transaction was the product of undue influence where there is a fiduciary relationship between the parties.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 26, 2011:

HILL v SEARS ROEBUCK & COMPANY, Nos. 143329, 143348, and 143633; Court of Appeals No. 295071. At oral argument, the parties shall include among the issues addressed (1) whether the defendant installers of the electrical appliance, Mark Pritchard and Timothy Dameron, had a duty to the plaintiffs with respect to the uncapped gas line in their home that was separate and distinct from their contractual duty to properly and safely install the electrical appliance; (2) whether these defendant installers created a new dangerous condition with respect to the uncapped gas line, or made an existing dangerous condition more hazardous; and (3) whether defendants-appellants Sears Roebuck & Company, Sears Logistic Services, Inc., Exel Direct, Inc., and Merchant Delivery, Inc., breached any duty owed to the plaintiffs. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied October 26, 2011:

PEOPLE v MACUGA, No. 142161; Court of Appeals No. 299820.

PEOPLE v KERRICK FARQUHARSON, No. 142368; Court of Appeals No. 290765.

PEOPLE v MCGHEE, No. 142871; Court of Appeals No. 295708.

CAVANAGH and MARILYN KELLY, JJ., would grant the application for leave to appeal.

PEOPLE v FALCON-FUENTES, No. 143013; Court of Appeals No. 295663.

PEOPLE v LARRY JONES, No. 143176; Court of Appeals No. 287201.

GRIEVANCE ADMINISTRATOR v SEFANI, No. 143204.

Reconsideration Denied October 26, 2011:

SCOTT v DIRECTOR OF ELECTIONS, No. 143878; Court of Appeals No. 306155. Summary disposition at 490 Mich 888. The motions for reconsideration of this Court's October 20, 2011, order are considered, and they are denied, because it does not appear that the order was entered erroneously.

The ultimate question here is whether signatures gathered on a recall petition are invalid if collected before a circuit court appeal of a ruling on the clarity of a petition is decided. MCL 168.952(7). Plaintiff, Representative Paul Scott, relying on this statute, urges that no signatures collected before the circuit court's decision are valid, and defendants argue to the contrary. Given the absence of explicit language in the statute indicating one way or the other, plaintiff's construction is at the very least debatable.

The granting of an injunction constitutes an extraordinary judicial power that is only justified when the party seeking an injunction can show a likelihood that it will succeed on the merits of the claim. *Northern Warehousing, Inc v Dep't of Ed*, 475 Mich 859 (2006). To halt an election by an injunction is an even more extraordinary action. "[E]quitable relief," such as an injunction, "may not properly be substituted for a statutory remedy prescribed for the determination of the validity of an election." *Attorney General v Ingham Circuit Judge*, 347 Mich 579, 584 (1957).

The circuit court's original decision concluding that plaintiff *had not* met his burden to prevent the recall election properly applied the standards for determining whether to grant an injunction. The court correctly concluded that plaintiff had not shown a likelihood of succeeding on his claim. *Scott v Director of Elections*, 490 Mich 888, 889-889 (2011).

Plaintiff has now petitioned this Court, claiming that he does not seek to prevent the recall election, but merely seeks to move it to the next scheduled election in February because of the confusion created by the several judicial decisions in this matter. However, plaintiff cites no authority for the proposition that this Court is authorized to "adjourn" an election.

It is our firm hope that those officials charged with administering the election in Genesee County will ensure the fullest participation in the electoral process of all citizens who wish to have their voices heard on this matter.

Summary Disposition October 28, 2011:

WILLIAMS v CITY OF DETROIT, No. 141101; Court of Appeals No. 290255. The motion for peremptory reversal is considered, and it is

granted. Pursuant to MCR 7.302(H)(1), in lieu of hearing oral argument on the application, we reverse the February 25, 2010, judgment of the Court of Appeals, and we reinstate the January 22, 2009, order of the Wayne Circuit Court granting summary disposition to the defendant. The plaintiff was not injured on a sidewalk or a trailway "on the highway" as required by MCL 691.1401(e) to avoid governmental immunity. See *Duffy v Dep't of Natural Resources*, 490 Mich 198, 202, 220-221 (2011). Accordingly, the highway exception to governmental immunity does not apply under the facts of this case, and the defendant is entitled to summary disposition.

MARILYN KELLY and HATHAWAY, JJ., would deny the motion for peremptory reversal.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered October 28, 2011:

HANNA v MERLOS, No. 142914; Court of Appeals No. 289513.

Leave to Appeal Denied October 28, 2011:

KENT COUNTY v DEPARTMENT OF HUMAN SERVICES, No. 142883; Court of Appeals No. 301151.

MARKMAN, J. (*concurring*). In 2006, a federal class action lawsuit was brought in the United States District Court for the Eastern District of Michigan against the Governor and the Department of Human Services (DHS), alleging that systemic deficiencies in Michigan's foster care system violated federal laws and regulations. *Dwayne B v Granholm*, Case No. 06-13548. In 2008, the parties entered into a consent agreement in which the defendants agreed to make certain changes in the state's foster care system. Michigan counties were not parties to this lawsuit or consent agreement, even though counties have the primary responsibility for the foster care system in this state. MCL 712A.25(1).

In the instant case, Kent County claims that the changes agreed to in the consent agreement increase the level of foster care services beyond that previously required by Michigan law and that the cost of such increased services exceeds $4 million a year. Its complaint alleges that the state has not provided it with any new funding to support the increased services required, in violation of the Headlee Amendment to the Michigan Constitution, which requires the state to provide funding to local governments "for any necessary increased costs" incurred by "an increase in the level of any . . . service beyond that required by existing law . . . ." Const 1963, art 9, § 29. The Court of Appeals dismissed the complaint because, under the relevant statutory definitions, plaintiff's increased service levels arose from a "court requirement," not a "state requirement," and thus the Constitution was not breached. *Kent Co v Michigan*, unpublished order of the Court of Appeals, entered January 18, 2011 (Docket No. 301151), citing MCL 21.232(3) and MCL 21.234(5); see also MCL 21.242.

Although I agree with the legal analysis of the Court of Appeals, and therefore concur with this Court's order, I nonetheless write

separately to observe that the state has embarked upon, and this Court has now affirmed, a procedure by which the state can impose increased costs on a local government and avoid what would otherwise be its constitutional obligation to reimburse the local government for such costs—settle a lawsuit to which the state, but not the local government, is a party, unilaterally consent to provide increased services of some kind, and then refuse to provide the local government with additional funding to pay for the increased services. Although this procedure may comport with the letter of the Headlee Amendment, the Legislature and the people of this state may wish to examine more closely whether it also comports with their own conceptions of what this amendment was designed to achieve.

DASCOLA V YMCA OF LANSING, No. 143320; Court of Appeals No. 293475.

YOUNG, C.J. (*concurring*). There is no question that, under Michigan's well-established premises liability law, the presence of water and soap residue in a public shower constitutes open and obvious dangers. As such, these conditions do not give rise to liability for a premises owner, and I believe that the lower courts clearly erred in not reaching this conclusion as a matter of law. However, because defendant has not filed a cross-appeal in this Court challenging the lower court's determination that defendant is not entitled to summary disposition, I concur in the Court's order denying leave to appeal.

Plaintiff fell while showering in a YMCA shower. She sued, alleging a premises liability theory of negligence—namely, that defendant allowed a hazardous condition (soap scum) to exist in the shower, notwithstanding defendant's claims that its employees checked the shower every 15 to 20 minutes, cleaned it every 1 to 2 hours, and deep cleaned and sterilized it every night. Defendant argued that the allegedly hazardous condition was open and obvious, but remarkably, the trial court denied defendant's motion for a directed verdict and held, as a matter of law, that the condition was *not* open and obvious, instructing the jury to this effect. On appeal, the Court of Appeals also rejected defendant's claim that the condition was open and obvious as a matter of law, but remanded for a new trial, holding that there was a question of fact whether the condition here was in fact open and obvious.[1] Plaintiff has appealed this latter holding.

It is axiomatic in Michigan law that a premises owner is not an absolute insurer against every conceivable harm that may occur on his premises.[2] While a premises owner owes a duty to exercise reasonable care to protect an invitee from unreasonable risks of harm caused by dangerous conditions on his land, the "open and obvious" doctrine is an integral part of the definition of this duty, providing that there is *no duty*

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[1] *Dascola v YMCA of Lansing*, unpublished opinion per curiam of the Court of Appeals, issued May 19, 2011 (Docket No. 293475). Judge SERVITTO dissented, and would have held that defendant deserved judgment as a matter of law because the alleged hazard was open and obvious.

[2] *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 500 (1988).

to warn or protect an invitee from dangers that are so obvious that an invitee should reasonably be expected to anticipate them.[3] A particular danger is open and obvious if an average person of ordinary intelligence would discover the danger upon casual inspection.[4] A common or expected condition is not uniquely dangerous.[5] Thus, whether a condition is open and obvious depends on whether a reasonably prudent person would foresee the danger, given the surrounding circumstances.[6]

With this understanding of Michigan law, the conclusion by the majority of the Court of Appeals that a question of fact exists regarding whether soap residue in a shower presents an open and obvious danger is, quite frankly, flabbergasting. Even a casual review of this state's premises liability and "open and obvious" caselaw compels the conclusion that any danger created by soap residue in a public shower presents an open and obvious condition. Although the proposition is so self-evident that it hardly merits stating, it is within common understanding that the flat tiled surfaces that comprise a shower will by their nature become wet and can therefore become slippery, particularly when soap or similar products are used. It is hardly surprising that soaps, shampoos, or other bathing substances will be used in a shower and may leave residue or "soap scum" on the shower's surface. That such surfaces may become slippery represents a quintessential "open and obvious" hazard. Moreover, there were no special attributes to this shower that rendered it uniquely or unreasonably dangerous. A reasonably prudent person of ordinary intelligence understands that a wet public shower poses a slip-and-fall hazard, particularly where soap or other residue may be present on the shower's surface.[7] The conclusion of the Court of Appeals majority holding that there is a question of fact in this regard defies common sense.

The open and obvious doctrine was developed to prevent lawsuits precisely like the present one. Because the law as applied on these facts clearly compels summary disposition in favor of defendant, had defen-

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[3] *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516 (2001).

[4] See, e.g., *Joyce v Rubin,* 249 Mich App 231, 238 (2002); *Novotney v Burger King Corp (On Remand)*, 198 Mich App 470, 475 (1993).

[5] See *Bertrand v Alan Ford, Inc*, 449 Mich 606, 614 (1995); *Corey v Davenport College of Business (On Remand),* 251 Mich App 1, 8-9 (2002).

[6] See, e.g., *Janson v Sajewski Funeral Home*, 486 Mich 934 (2010); *Kenny v Kaatz Funeral Home*, 472 Mich 929 (2005), rev'g *Kenny v Kaatz Funeral Home*, 264 Mich App 99 (2004), for the reasons stated in Judge GRIFFIN's dissenting opinion, 264 Mich App at 115; *Ververis v Hartfield Lanes (On Remand)*, 271 Mich App 61 (2006).

[7] Whether plaintiff saw the soap residue on the floor before or after her fall is irrelevant because the determination whether a reasonably prudent person would discover or anticipate this danger is an *objective* question.

dant filed a cross-appeal in this Court requesting such relief, I would have voted to grant it.[8] Nevertheless, absent this request I concur in the decision to deny leave to appeal.

MARKMAN, J., joined the statement of YOUNG, C.J.

PEOPLE v FLAGEL, No. 143403; Court of Appeals No. 303471.

YOUNG, C.J. (*concurring*). In this case, the 75-year-old defendant sexually assaulted the 8-year-old victim over the course of a year. He pleaded guilty to three counts of criminal sexual conduct in the second degree. At sentencing, defendant was scored 15 points under offense variable 8 (OV 8) for asportation of a victim to a place of greater danger because he took the victim to his hot tub or isolated places on the beach in order to sexually assault her. On appeal here, defendant argues that the trial court erred in assessing these points, relying on this Court's order in *People v Thompson*, which held that where movement of a victim is "incidental to commission of the crime," it does not amount to asportation.[1]

As I stated in *Thompson*: there is no "bedroom exception" to OV 8, and thus even where a defendant takes a victim to places that are "traditionally favored location[s] for sexual activity," he may still be assessed points pursuant to OV 8 if that asportation is to a place or situation of greater danger.[2] Contrary to defendant's view, this Court's order in *Thompson* should not be read as having created a categorical new exception to OV 8 covering favored locations for sexual activity, such as a bedroom or, apparently, a hot tub or isolated place at the beach.

Because defendant took the victim to places of greater danger where others were less likely to discover defendant committing the sexual assaults, he was appropriately assessed 15 points under OV 8.

PEOPLE v DAVONTAE SANFORD, No. 143881; Court of Appeals No. 305481.

Summary Disposition November 2, 2011:

PEOPLE v FLOYD, Nos. 142617 and 142618; Court of Appeals Nos. 286550 and 293650. Pursuant to MCR 7.302(H)(1), in lieu of granting

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[8] Although defendant responded to plaintiff's application for leave to appeal here, defendant did not appeal the lower court's holding affirming the trial court's denial of defendant's motion for summary disposition. Accordingly, plaintiff's appeal arising out of its separate motion for summary disposition is the only controversy properly before this Court.

[1] 488 Mich 888 (2010). In *Thompson*, the defendant had sexual relations with his 13-year-old stepdaughter on over 70 occasions, always in the defendant's or victim's bedroom—places of relative seclusion where the victimization could occur without interruption or discovery by another person in the house.

[2] See *People v Thompson*, 488 Mich 888, 889 (2010) (YOUNG, J., joined by CORRIGAN, J., dissenting).

appeal, we vacate that part of our order in this case dated June 27, 2008, 481 Mich 938, 938-939, which found a violation of *People v Tanner*, 387 Mich 683 (1973). The decision in *Tanner*, does not apply to sentences where the statutory maximum is "life or any term of years." See *People v Powe*, 469 Mich 1032 (2004); *People v Drohan,* 475 Mich 140, 162 n 14 (2006); *People v Harper*, 479 Mich 599, 617 n 31 (2007), and *People v Washington*, 489 Mich 871 (2011). We therefore vacate that part of the judgment of the Court of Appeals that remanded for resentencing based on a violation of *Tanner*. In all other respects, leave to appeal is denied.

CAVANAGH, J., would grant leave to appeal.

GEOGHEGAN v NORTHWEST AIRLINES, INC, No. 143034; Court of Appeals No. 299759. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Michigan Compensation Appellate Commission, the successor to the Workers' Compensation Appellate Commission (WCAC), for reconsideration of the defendants' partial disability issue, which relies on *Lofton v AutoZone, Inc*, 482 Mich 1005 (2008). In light of the WCAC's determination that the magistrate should not have found that the plaintiff established "total incapacity" because "[n]one of the physicians opined that the plaintiff was completely unable to work during all relevant time periods," the WCAC erred by failing to consider application of the partial disability provision of the Worker's Disability Compensation Act, MCL 418.361(1).

In all other respects, leave to appeal is denied. We do not retain jurisdiction.

MARILYN KELLY and HATHAWAY, JJ., would simply deny leave to appeal.

PEOPLE v JOHNSTON, Nos. 143067 and 143068; Court of Appeals Nos. 302477 and 302480. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

HUBBARD v DETROIT PUBLIC SCHOOLS, No. 143354; Court of Appeals No. 293292. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals as on reconsideration granted. The court shall consider whether jurisdiction in the Court of Appeals was lacking where the petitioning teacher did not file a statement of exceptions to the decision of the administrative law judge. See MCL 38.104(5)(*l*), which provides: "A matter that is not included in a statement of exceptions filed under subdivision (j) or in a statement of cross-exceptions filed under subdivision (k) is considered waived and cannot be heard before the tenure commission or on appeal to the court of appeals." We do not retain jurisdiction.

Leave to Appeal Granted November 2, 2011:

In re PRICE ESTATE (PRICE v KOSMALSKI), No. 143123; reported below: 292 Mich App 294. The parties shall address: (1) whether a mortgagee must affirmatively consent to the appointment of a receiver to be required to pay the receiver's costs and fees; (2) whether the statutory

right of first priority belonging to the holder of the recorded mortgage, MCL 600.3236, overrides the common-law rule that a receiver's costs and fees are entitled to first priority; and (3) whether a mortgagee must actually benefit from the incurred expenses or whether a mortgagee can be required to pay for expenses that did not benefit it.

The Michigan Association of Realtors, the Michigan Chamber of Commerce, and the Real Property Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied November 2, 2011:

WINFIELD v WINFIELD, No. 142723; Court of Appeals No. 299181.

In re MOON ESTATE, No. 142743; Court of Appeals No. 294176.

MARILYN KELLY, J., would grant leave to appeal.

PEOPLE v RESENDEZ, No. 142800; Court of Appeals No. 300841.

PEOPLE v TORRES, Nos. 143074, 143075, and 143076; Court of Appeals Nos. 296025, 296026, and 296027.

MARILYN KELLY, J., would remand for resentencing.

PEOPLE v MAXEY, No. 143089; Court of Appeals No. 294418.

PEOPLE v HESS, No. 143293; Court of Appeals No. 303366.

Order Directing Further Briefing Entered November 2, 2011:

In re EXECUTIVE MESSAGE OF THE GOVERNOR (BROWN v GOVERNOR), No. 143563.

The Executive Message of the Governor pursuant to MCR 7.305(A) was received on August 12, 2011, requesting that this Court direct the Ingham Circuit Court to certify certain questions for immediate determination by this Court. In lieu of acting on the Governor's request at this time, we direct the plaintiffs and the defendants to file with this Court by December 14, 2011, briefs, including a statement of facts, in support of their positions on the questions posed by the Executive Message of the Governor. The parties shall address:

(1) whether the requirements of MCR 7.305(A) have been met;

(2) whether the urgency of the request under MCR 7.305(A) is mitigated by MCR 7.302(B)(4)(b), which allows a party to request this Court to bypass review by the Court of Appeals after "a ruling that a provision of . . . a Michigan statute . . . is invalid";

(3) whether 2011 PA 4 violates Const 1963, art 3, § 2 (separation of powers), or Const 1963, art 4, § 1 (legislative power), in its authorization of an emergency manager;

(4) whether 2011 PA 4 violates Const 1963, art 4, § 29 (local or special acts) by permitting an emergency manager to exercise powers of a local governmental unit;

(5) whether 2011 PA 4 violates Const 1963, art 7, § 22 (charters, resolutions, ordinances, enumeration of powers) by allowing an emergency manager to exercise powers of a local governmental unit;

(6) whether 2011 PA 4 violates due process rights set forth in Const 1963, art 1, § 17, or violates any right that is retained in Const 1963, art 1, § 23, by allowing an emergency manager to assume the power and authority of a local governmental unit;

(7) whether 2011 PA 4 violates Const 1963, art 7, §§ 21, 22, and 34 (provisions for local government) by allowing an emergency manager to assume the power and authority of a local governmental unit;

(8) whether 2011 PA 4 violates Const 1963, art 9, § 29 (Headlee Amendment) by requiring the local government for which the emergency manager is appointed to pay for certain costs associated with the emergency manager.

The Executive Message remains under consideration.

Summary Disposition November 4, 2011:

MILLER v CITIZENS INSURANCE COMPANY, No. 141747; reported below: 288 Mich App 424. Leave to appeal having been granted, and the briefs and oral argument of the parties having been considered by the Court, we hereby reverse in part and affirm in part the May 13, 2010, judgment of the Court of Appeals. This is an attorney fee dispute arising out of an action for benefits under the no-fault act, MCL 500.3101 *et seq*. As the Court of Appeals implicitly recognized, the Detroit Medical Center (DMC) is not liable for plaintiff's attorney's fees under the no-fault act. We agree that plaintiff is responsible for payment of her attorney fees consistent with the contingency fee agreement. Consistent with the common-law American rule, the no-fault act generally requires each party to pay its own attorney fees. Plaintiff's reliance on MCL 500.3112 is unavailing because that provision, which permits equitable apportionment of personal protection insurance benefits among payees, does not encompass an award of attorney fees to an insured's counsel. However, the Court of Appeals' reliance on the common-fund exception to the American rule was erroneous because no common fund was created.

Of concern to this Court is that the circuit court's order, and the Court of Appeals' affirmance, could be mistakenly interpreted as extinguishing the DMC's contractual right to payment for its services. We wish to make clear that this is not the case. No-fault benefits are "payable to or for the benefit of an injured person . . . ." MCL 500.3112. In this case, through settlement, the benefits were paid to plaintiff, and her attorney asserted an attorney's charging lien over the settlement proceeds. Thus, the effect of this was only to settle claims as between the insurer, plaintiff, and her attorney. The circuit court's order of dismissal pursuant to the settlement agreement did not have the effect of extinguishing the DMC's right to collect the remainder of its bill from plaintiff. Such a result could not have been achieved without an explicit waiver, or at least unequivocal acquiescence, by the DMC, which was not obtained.

HATHAWAY, J., did not participate because she is currently involved in a business transaction with a member of the law firm retained as co-counsel for plaintiff-appellee.

Leave to Appeal Denied November 4, 2011:

In re MGMC, No. 143893; Court of Appeals No. 302449.

Statement Regarding Decision on Motion for Disqualification Entered November 7, 2011:

PEOPLE v WINBURN, No. 143914; Court of Appeals No. 303223.

MARKMAN, J. Defendant has brought a motion pursuant to MCR 2.003, which is entitled a "Motion to Offer Justice Stephen J. Markman an Opportunity to Disqualify Himself From Presiding Over This Action." In his prayer for relief, defendant states that he "would not object" if I disqualify myself. Treating this as a motion for disqualification and assuming that it is, in fact, defendant's intention to obtain my recusal, I deny the motion. Defendant alleges that the instant appeal pertaining to his conviction for a 1990 murder involves overlapping facts with a federal investigation by the Bureau of Alcohol, Tobacco, and Firearms of narcotics trafficking in which defendant was alleged by the Bureau to have been involved. It is further alleged that I reviewed this investigation as the former United States Attorney and ultimately declined to pursue charges in 1992. However, defendant has established no connection between the facts of the 1990 murder that are currently in dispute and the circumstances of the federal drug investigation in 1992, except that defendant was involved in both matters. Thus, the crux of defendant's argument is simply that I participated in a decision (not to prosecute defendant) nearly two decades ago, and that I am now participating in another decision concerning a different crime in which defendant was allegedly also involved. This is not a circumstance, in my judgment, that requires judicial disqualification. Furthermore, I have no actual bias against defendant, and there are no other grounds that exist in support of my disqualification.

Leave to Appeal Denied November 10, 2011:

NYLAND v KMART, No. 142965; Court of Appeals No. 295464.

ZAHRA, J. (*concurring*). I concur in the order denying defendant's application. I write separately because this case represents a unique scenario in which there exists a genuine issue of material fact in regard to whether an icy condition presents an unreasonable risk of harm that is not open and obvious to casual inspection.

In March 2007, plaintiff exited defendant's store at about 9:00 a.m. and slipped on a patch of ice that was underneath dirt. There is no dispute that the ice itself was not visible. One of defendant's employees reported that after the accident he found "ice just outside of the door [that] was covered by a layer of dirt." There was also testimony that the dirt had not been intentionally placed over the ice but had accumulated

naturally. In addition, the record reflects that it was sunny, had not snowed for several days, and the parking lot and the area around the entrance were otherwise clear of ice and snow. Importantly, these existing weather conditions did not suggest there was a slippery patch of ice outside the store. This is not a case where snow covers a walkway and itself warns invitees of the potential slipping hazard; there was absolutely nothing about the weather conditions or the dirt patch to warn plaintiff of a potential ice hazard. Accordingly, I agree with the Court of Appeals that there exists a genuine issue of material fact whether, under these circumstances, a reasonably prudent person would foresee the icy condition upon casual inspection and that summary disposition in this case was improper.

NEAL V DEPARTMENT OF CORRECTIONS, Nos. 143855 and 143866; Court of Appeals Nos. 305186 and 305195.

MARKMAN, J. (*dissenting*). I respectfully dissent. The Michigan Department of Corrections (MDOC) entered into a class-action settlement agreement in 2009 to pay $100 million to plaintiffs—an estimated 800 female prisoners alleging that they had been the victims of sexual misconduct by state prison personnel. In connection with the settlement, the MDOC also agreed that it would not publicly disclose the names of individual plaintiffs. As a result, not only will the public be deprived of knowledge as to whom $100 million in state revenues is to be disbursed, but the victims of plaintiffs' crimes, who are owed restitution will be deprived of knowledge as to whether those who owe them such restitution, will be sharing in this settlement. The Oakland County Reimbursement Unit (OCRU), the agency charged with collecting court-ordered restitution on behalf of victims from defendants sentenced in Oakland County, asks this Court to stay the distribution of proceeds until issues it has raised concerning the settlement can be resolved. I would grant the stay.

MCL 791.220h provides:

> (1) If a prisoner is ordered to pay *restitution* to the victim of a crime and the department receives a copy of the restitution order from the court, the department shall deduct *50%* of the funds received by the prisoner in a month over $50.00 for payment of restitution. The department shall promptly forward the restitution amount to the crime victim as provided in the order of restitution when the amount exceeds $100.00, or the entire amount if the prisoner is paroled, transferred to community programs, or is discharged on the maximum sentence. The department shall notify the prisoner in writing of all deductions and payments made under this section. The requirements of this subsection remain in effect until all of the restitution has been paid.
>
> (2) *Any funds owed by the Michigan department of corrections* or to be paid on behalf of one or more of its employees to satisfy a judgment or settlement to a person for a claim that arose while the person was incarcerated, shall be paid to satisfy any order(s) of

restitution imposed on the claimant that the department has a record of. The payment shall be made as described in subsection (1). The obligation to pay the funds, described in this section, shall not be compromised. As used in this section, "fund" or "funds" means that portion of a settlement or judgment that remains to be paid to a claimant after statutory and contractual court costs, attorney fees, and expenses of litigation, subject to the court's approval, have been deducted.

(3) The department shall not enter into any agreement with a prisoner that modifies the requirements of subsection (1). Any agreement in violation of this subsection is void. [Emphasis added.]

MCL 600.5511 provides, in pertinent part:

(2) Subject to section 220h of 1953 PA 232, MCL 791.220h, and the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834, *any damages awarded to a prisoner in connection with a civil action brought against a prison* or against an official, employee, or agent of a prison shall be paid directly to satisfy any outstanding *restitution* orders pending against the prisoner, including, but not limited to, restitution orders issued under the state correctional facility reimbursement act, 1935 PA 253, MCL 800.401 to 800.406, the prisoner reimbursement to the county act, 1984 PA 118, MCL 801.81 to 801.93, 1982 PA 14, MCL 801.301, and the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834, any outstanding costs and fees, and any other debt or assessment owed to the jurisdiction housing the prisoner. The remainder of the award after full payment of all pending restitution orders, costs, and fees shall be forwarded to the prisoner.

(3) Before payment of any damages awarded to a prisoner in connection with a civil action described in subsection (2), the court awarding the damages shall make reasonable efforts to *notify* the victims of the crime for which the prisoner was convicted and incarcerated concerning the pending payment of damages. [Emphasis added.]

The OCRU, in my judgment, raises compelling arguments that, pursuant to MCL 600.5511(2) and MCL 791.220h(2), *all* of the funds received by prisoners owing restitution should *first* be disbursed to the victims owed restitution, and that, pursuant to MCL 600.5511(3), the victims are entitled to notice before any funds are disbursed to prisoners. However, the MDOC here is disbursing to the victims in each of six yearly installments (presumably until full restitution has been made) only 50% of the settlement funds paid to prisoners owing restitution, and the MDOC has refused to provide prior notice to the victims or to the OCRU as to which prisoners owing restitution are recipients of the settlement in this case.

By refusing to stay the plan of allocation entered into between plaintiffs and the MDOC, this Court fails to recognize that the Legislature, in seeking to ensure the fullest possible restitution for the victims

of crime, has also apparently determined that the attainment of this objective is practically contingent upon compliance with particular legal procedures established by the Legislature, in particular by legal requirements that notice be provided to victims *before* prisoners receive the proceeds of civil settlements, and that restitution be fully paid *before* prisoners receive any part of such proceeds. That is, the procedures established in the law are designed to ensure that victims are fully restituted, and a failure to comply with these procedures may well in some instances undermine the ability of criminal victims to effectively secure the restitution that they are owed.

The majority's refusal to stay the further distribution of settlement proceeds will, in my judgment, almost certainly prejudice the ability of some unknown number of victims to ever receive the full amount of restitution to which they are entitled. And as a result, some larger portion of the settlement will be disbursed to persons who *owe* restitution, and some smaller portion will be disbursed to persons who are *owed* restitution, in contravention of what OCRU argues is required by the law.

First, because the MDOC has agreed under the plan that neither the public, nor the OCRU, nor the individual victims of plaintiffs' crimes are to be apprised beforehand as to which prisoners have been awarded a share of the settlement, some victims will simply be unaware of the changed financial circumstances of those who have perpetrated crimes against them. These persons will be entirely dependent upon the MDOC for an accurate accounting of who is owed restitution and in what amount. The OCRU—whose principal mission it is to collect court-ordered restitution—will be unable to assist these victims and to correct inevitable errors in MDOC's records because it too is being denied access to any list of prisoners receiving settlement funds. Any inaccuracies in MDOC's records will thus ensure that some victims will never be made aware that the restitution owed them might have been practically obtainable as a result of the settlement. Moreover, the OCRU argues that the procedures followed by the MDOC are contrary to MCL 600.5511(3), which is predicated upon the idea that the victim and the OCRU are entitled to be informed *before* public funds are disbursed to prisoners from the state treasury, so that all available efforts can first be undertaken to ensure that restitution in the proper amount is paid to criminal victims from such funds.

Second, persons owed restitution in excess of 50 percent of the total amount of plaintiffs' share of the settlement proceeds may well be prejudiced in their ability ever to secure full restitution. For example, victim Smith is owed $10,000 in restitution from prisoner Jones, and prisoner Jones is awarded $18,000 in a settlement, to be paid, as here, in six annual installments of $3000 each. Under the MDOC's 50 percent plan, Smith will be paid 6 x $1500 or a total of $9000. Instead then of being fully restituted, as he could have been from Jones's award, Smith will still be owed $1000, and his only recourse will be to undertake new legal actions to attempt to recover whatever may be left of Jones's settlement—legal actions replete with attorney fees and directed toward a person who would have had entirely no incentive, or perhaps no

self-discipline, to have preserved settlement proceeds for up to five or six years for the benefit of a victim whose victimhood she had caused in the first place.

I would immediately stay any further disbursements to prisoners until the Court of Appeals has finally determined: (a) whether notice to the victims is required by law to be provided by the MDOC *before* any proceeds of a class-action settlement are disbursed to prisoners; and (b) whether full, and not half, payments of restitution are required by law to be disbursed to victims of plaintiffs' crimes *before* any disbursements are made to plaintiffs.

YOUNG, C.J., joined the statement of MARKMAN, J.

HATHAWAY, J. I am recusing myself from participating because a member of my family is counsel for one of the parties in this matter. See MCR 2.003(C)(1)(g)(ii).

MARY BETH KELLY, J. I am recusing myself from this case based on a personal relationship with one of the plaintiffs which, in my judgment, gives rise to an appearance of impropriety. MCR 2.003(C)(1)(b).

In re KELLY, No. 143917; Court of Appeals No. 302550.

Summary Disposition November 16, 2011:

RESIDENTIAL FUNDING CO, LLC v SAURMAN and BANK OF NEW YORK TRUST CO v MESSNER, Nos. 143178 and 143179; reported below: 292 Mich App 321. On November 10, 2011, the Court heard oral argument on the application for leave to appeal the April 21, 2011, judgment of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. As the Court of Appeals dissenting opinion explained, "pursuant to MCL 600.3204(1)(d), Mortgage Electronic Registration Systems, Inc. (MERS), was 'the owner . . . of an interest in the indebtedness secured by the mortgage' at issue in each of these consolidated appeals" because MERS's "contractual obligations as mortgagee were dependent on whether the mortgagor met the obligation to pay the indebtedness that the mortgage secured." *Residential Funding Co, LLC v Saurman*, 292 Mich App 321, 348 (2011) (WILDER, J., dissenting). We clarify, however, that MERS' status as an "owner of an interest in the indebtedness" does not equate to an ownership interest in the note. Rather, as record-holder of the mortgage, MERS owned a security lien on the properties, the continued existence of which was contingent upon the satisfaction of the indebtedness. This interest in the indebtedness—i.e., the ownership of legal title to a security lien whose existence is wholly contingent on the satisfaction of the indebtedness—authorized MERS to foreclose by advertisement under MCL 600.3204(1)(d).

Furthermore, we add that the Court of Appeals' conclusion to the contrary is inconsistent with established legal principles governing Michigan's real property law, and specifically foreclosure by advertisement. "Under the settled law of this State, the mortgage and the note are to be construed together." *Guardian Depositors Corp v Wagner*, 287 Mich 202, 208 (1939). "'The rule is well-settled that . . . the mortgagee has a

lien on the land to secure the debt." *McKeighan v Citizens Commercial & Savings Bank*, 302 Mich 666, 670 (1942). "It has never been necessary that the mortgage should be given directly to the beneficiaries. The security is always made in trust to secure obligations, and the trust and the beneficial interest need not be in the same hands. . . . The choice of a mortgagee is a matter of convenience." *Adams v Niemann*, 46 Mich 135, 137 (1881). See also *Canvasser v Bankers Trust Co*, 284 Mich 634, 639 (1938). Indeed, in interpreting predecessor foreclosure-by-advertisement statutes, in cases in which the mortgagee had transferred a beneficial interest, but retained record title, this Court has unanimously held that "[o]nly the record holder of the mortgage has the power to foreclose; the validity of the foreclosure is not affected by any unrecorded assignment of interest held for security." *Arnold v DMR Fin Servs, Inc (*AFTER REMAND), 448 Mich 671, 678 (1995); see also *Feldman v Equitable Trust Co*, 278 Mich 619, 624-625 (1937).

We discern no indication that when the Legislature amended MCL 600.3204(1) in 1994, it meant to establish a new legal framework in which an undisputed record holder of a mortgage, such as MERS, no longer possesses the statutory authority to foreclose. Rather, as explained above, the Legislature's use of the phrase "interest in the indebtedness" to denote a category of parties entitled to foreclose by advertisement indicates the intent to include mortgagees of record among the parties entitled to foreclose by advertisement, along with parties who "own[] the indebtedness" and parties who act as "the servicing agent of the mortgage." MCL 600.3204(1)(d). We therefore reverse the Court of Appeals' decision because it erroneously construed MCL 600.3204(1)(d).

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would grant leave to appeal.

Summary Disposition November 21, 2011:

PEOPLE v CYNTHIA LITTLETON, No. 143465; Court of Appeals No. 303998. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Wayne Circuit Court with instructions to amend the judgment of sentence in Case No. 10-002761-FH to reflect a sentence of 12 to 48 months in accordance with the sentence evaluation offered pursuant to *People v Cobbs*, 443 Mich 276 (1993). In all other respects, leave to appeal is denied.

PEOPLE v CROFF, No. 143536; Court of Appeals No. 302088. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the order of the Court of Appeals, and remand this case to the Court of Appeals for consideration as on leave granted. The Court of Appeals' order is insufficient to provide meaningful appellate review. The order remands this case to the Ingham Circuit Court for resentencing within a specific sentencing guidelines range, but provides no basis for review because it fails to explain how the circuit court erred and the standards used by the Court of Appeals in reviewing the circuit court's decisions. We do not retain jurisdiction.

PEOPLE v PENNEBAKER, No. 143706; Court of Appeals No. 304708. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied November 21, 2011:

PEOPLE v KILPATRICK, No. 142195; Court of Appeals No. 300058.

PEOPLE v LOVE, No. 142528; Court of Appeals No. 293810.

PEOPLE v MARCELLO LEWIS, No. 142631; Court of Appeals No. 293485.

PEOPLE v RITA WILSON, No. 142930; Court of Appeals No. 298508.

WHITESELL INTERNATIONAL CORPORATION v WHITAKER, Nos. 142934 and 143169; Court of Appeals No. 287569.

ZAHRA, J., did not participate because he was on the Court of Appeals panel.

PEOPLE v MAURICE HAYNES, No. 143027; Court of Appeals No. 302957.

PEOPLE v ROBERT KING, No. 143052; Court of Appeals No. 298827.

PRESIDENT INN PROPERTIES, LLC v CITY OF GRAND RAPIDS, No. 143053; reported below: 291 Mich App 625.

PEOPLE v SHAWN YOUNG, No. 143060; Court of Appeals No. 303145.

PEOPLE v PERREAULT, No. 143226; Court of Appeals No. 293324.

PEOPLE v DOUGLAS JACKSON, No. 143249; Court of Appeals No. 295994.

MIDLAND NATIONAL LIFE INSURANCE COMPANY v NIKKEL, No. 143276; Court of Appeals No. 295300.

JOHNSON v CHESTERFIELD TOWNSHIP, No. 143298; Court of Appeals No. 300278.

PEOPLE v MAKIELSKI, No. 143311; Court of Appeals No. 296386.

PEOPLE v ZARD REED, No. 143373; Court of Appeals No. 292865.

JACOBSON v LLOYD, No. 143376; Court of Appeals No. 294929.

PEOPLE v KOWALEWSKI, No. 143401; Court of Appeals No. 296160.

PEOPLE v DANIEL FOSTER, No. 143410; Court of Appeals No. 297024.

PEOPLE v SHIFFER, No. 143415; Court of Appeals No. 296375.

SEYMORE v DEPARTMENT OF CORRECTIONS, No. 143416; Court of Appeals No. 303278.

PEOPLE v AL-JAMAILAWI, No. 143423; Court of Appeals No. 292774.

PEOPLE v ANDRE BROWN, No. 143437; Court of Appeals No. 300003.

PEOPLE v BISHOP PERRY, No. 143442; Court of Appeals No. 296777.

PEOPLE v THREATT, No. 143452; Court of Appeals No. 303733.

NATIONAL CITY BANK v BON CHANCE II LC, No. 143461; Court of Appeals No. 295166.

PEOPLE v FRANK HENDERSON, No. 143462; Court of Appeals No. 297994.

WOODS v JLG INDUSTRIES, INC, No. 143468; Court of Appeals No. 295289.

DOE v ANN ARBOR PUBLIC SCHOOLS, No. 143470; Court of Appeals Nos. 294692, 295715, and 294994.

PEOPLE v DULAK, No. 143471; Court of Appeals No. 296639.

PEOPLE v MARTEZ WILLIAMS, No. 143480; Court of Appeals No. 294561.

PEOPLE v MCCRAY, No. 143483; Court of Appeals No. 302260.

PEOPLE v ALEXANDER, Nos. 143492 and 143493; Court of Appeals Nos. 303502 and 303505.

PEOPLE v JACKSON TAYLOR, No. 143495; Court of Appeals No. 296758.

CHRISTMAN COMPANY v RENAISSANCE PRECAST INDUSTRIES LLC, No. 143497; Court of Appeals No. 296316.

REED ESTATE v REED, No. 143500; reported below: 293 Mich App 168.

LONG v DETROIT CIVIL SERVICE COMMISSION, No. 143504; Court of Appeals No. 296698.

PEOPLE v NEIL, No. 143506; Court of Appeals No. 303817.

PEOPLE v TYRONE PRICE, No. 143507; Court of Appeals No. 301584.

JPMORGAN CHASE BANK NA v FOUNDERS BANK & TRUST, No. 143509; Court of Appeals No. 297892.

PEOPLE v DYJAK, No. 143510; Court of Appeals No. 296571.

BULTEMA v ONGERT, Nos. 143511 and 143512; Court of Appeals Nos. 296727 and 296728.

PEOPLE v VALENTINO BENNETT, No. 143513; Court of Appeals No. 303579.

PEOPLE v PITTMAN, No. 143521; Court of Appeals No. 297391.

PEOPLE v WEISENBACH, Nos. 143527 and 143529; Court of Appeals Nos. 296745 and 296746.

PEOPLE v SPENCER WILLIAMS, No. 143530; Court of Appeals No. 297732.

PEOPLE v VAN WAGONER, No. 143531; Court of Appeals No. 298695.

PEOPLE v HEAVEN, No. 143533; Court of Appeals No. 303993.

PEOPLE v FUNTUKIS, No. 143535; Court of Appeals No. 297098.

PEOPLE v HENDRICKS, No. 143538; Court of Appeals No. 297371.

PEOPLE v FLAKES, No. 143540; Court of Appeals No. 295824.

PEOPLE v JEFFERSON, No. 143544; Court of Appeals No. 297790.

PEOPLE v STERMER, No. 143546; Court of Appeals No. 297057.

PEOPLE v BOLES, No. 143547; Court of Appeals No. 296684.

PEOPLE v HERNANDEZ, Nos. 143549 and 143550; Court of Appeals Nos. 297054 and 300338.

BERGLUND v INDUSTRIAL TECHNOLOGY INSTITUTE, No. 143551; Court of Appeals No. 298227.

PEOPLE v TURNER, No. 143553; Court of Appeals No. 304138.

PEOPLE v TRAVIS OWENS, No. 143554; Court of Appeals No. 297315.

PEOPLE v FROST, No. 143556; Court of Appeals No. 298702.

PEOPLE v LANG, No. 143562; Court of Appeals No. 304597.

PEOPLE v GRUSNICK, No. 143567; Court of Appeals No. 297671.

PEOPLE v PRETIKEN, No. 143568; Court of Appeals No. 296520.

PEOPLE v WARREN, No. 143569; Court of Appeals No. 304623.

PEOPLE v MCCLINTON, No. 143570; Court of Appeals No. 303037.

PEOPLE v SAWYER, No. 143571; Court of Appeals No. 296782.

PEOPLE v MANCIO, No. 143573; Court of Appeals No. 297307.

PEOPLE v SENTEK, No. 143577; Court of Appeals No. 297269.

PEOPLE v MAXWELL, No. 143587; Court of Appeals No. 297383.

PEOPLE v SPARKMAN, No. 143589; Court of Appeals No. 295383.

PEOPLE v LOUIS MATTHEWS, No. 143590; Court of Appeals No. 295307.

PEOPLE v JAMES CROSS, No. 143592; Court of Appeals No. 295549.

PEOPLE v DEANGELIS, No. 143593; Court of Appeals No. 304048.

PEOPLE v SID JONES, No. 143594; Court of Appeals No. 293773.

PEOPLE v MCBRIDE, No. 143597; Court of Appeals No. 296938.

PEOPLE v HASSEN, No. 143598; Court of Appeals No. 303568.

PEOPLE v RAPHAEL MOORE, No. 143599; Court of Appeals No. 297428.

PEOPLE v URIBE, No. 143601; Court of Appeals No. 304441.

PEOPLE v MARKEITHIS SMITH, No. 143608; Court of Appeals No. 300772.

PEOPLE v SHAMROUKH, No. 143609; Court of Appeals No. 300883.

PEOPLE v HOWELL, No. 143611; Court of Appeals No. 304287.

PEOPLE v COBREA, No. 143616; Court of Appeals No. 296060.

CITY OF ALBION v CLK PROPERTIES LLC, No. 143617; Court of Appeals No. 298069.

SAREINI v PAROLE BOARD, No. 143619; Court of Appeals No. 302100.

PEOPLE v MICHALCZAK, No. 143620; Court of Appeals No. 304427.

PEOPLE v ALDRICH, No. 143628; Court of Appeals No. 304508.

PEOPLE v CAGE, No. 143632; Court of Appeals No. 304175.

PEOPLE v HOISINGTON, No. 143638; Court of Appeals No. 304659.

PEOPLE v AGNEW, No. 143639; Court of Appeals No. 289692.

PEOPLE v MICHAEL MOORE, No. 143640; Court of Appeals No. 304585.

JACKSON v MECOSTA COUNTY MEDICAL CENTER, No. 143646; Court of Appeals No. 295219.

FRENCH v MACARTHUR, No. 143648; Court of Appeals No. 296526.

PEOPLE v AL-TAMIMI, No. 143649; Court of Appeals No. 298210.

CONVIS TOWNSHIP v COLLARD, No. 143651; Court of Appeals No. 300659.

BIES-RICE v RICE, No. 143652; Court of Appeals No. 304313.

PEOPLE v WIGGINS, No. 143656; Court of Appeals No. 304129.

PEOPLE v MCDANIEL, No. 143670; Court of Appeals No. 297738.

PEOPLE v LACHNIET, No. 143675; Court of Appeals No. 297836.

ANIEL v CITY OF PONTIAC, No. 143678; Court of Appeals No. 297901.

PEOPLE v DAVID MCLEAN, No. 143683; Court of Appeals No. 298260.

PEOPLE v BRAZIL, No. 143692; Court of Appeals No. 297094.

PEOPLE v HURLEY, No. 143694; Court of Appeals No. 298463.

PEOPLE v HADDIX, No. 143701; Court of Appeals No. 303871.

MICHAEL S SHERMAN, DO, PC v SHERROD, Nos. 143731 and 143732; Court of Appeals Nos. 299045 and 299775.

Superintending Control Denied November 21, 2011:

OIL NIAGARAN LLC v 13TH JUDICIAL CIRCUIT COURT, No. 143699.

WESTERN LAND SERVICES, INC v 13TH JUDICIAL CIRCUIT COURT, No. 143879.

Reconsideration Denied November 21, 2011:

PEOPLE v KASKE, No. 142208; Court of Appeals No. 299548. Leave to appeal denied at 489 Mich 989.

PEOPLE v BREEDING, No. 142939; Court of Appeals No. 291554. Leave to appeal denied at 489 Mich 993.

PEOPLE v BEKEIBA HOLLAND, No. 142503; Court of Appeals No. 299947. Leave to appeal denied at 490 Mich 857.

PEOPLE v ZEBADIAH HOLLAND, No. 142505; Court of Appeals No. 299948. Leave to appeal denied at 490 Mich 857.

GRIEVANCE ADMINISTRATOR v MACDONALD, No. 142729. Leave to appeal denied at 489 Mich 991.

GRIEVANCE ADMINISTRATOR v DUNCHOCK, No. 142795. Leave to appeal denied at 490 Mich 863.

PEOPLE v ARDIS LEE, No. 142798; Court of Appeals No. 301588. Leave to appeal denied at 490 Mich 858.

WOLFORD v PIKARSKI, No. 142805; Court of Appeals No. 295989. Summary disposition at 490 Mich 854.

HATHAWAY, J., would grant the plaintiff's motion for reconsideration.

PEOPLE v QUACY ROBERTS, No. 142847; Court of Appeals No. 293838. Leave to appeal denied at 489 Mich 976.

MORSE v CONSUMERS ENERGY, No. 142864; Court of Appeals No. 292688. Leave to appeal denied at 489 Mich 992.

PEOPLE v CARICO, No. 142896; Court of Appeals No. 299319. Leave to appeal denied at 490 Mich 859.

PEOPLE v ANTHONY PRITCHETT, No. 142942; Court of Appeals No. 302095. Leave to appeal denied at 490 Mich 859.

In re CONSERVATORSHIP OF SIMMONS, No. 143125; Court of Appeals No. 297232. Leave to appeal denied at 490 Mich 861.

PEOPLE v HUDSON, No. 143132; Court of Appeals No. 302578. Leave to appeal denied at 490 Mich 861.

Summary Disposition November 23, 2011:

KIRBY v GENERAL MOTORS CORPORATION, No. 143455; Court of Appeals No. 300848. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the decision of the Workers' Compensation Appellate Commission (WCAC), and we remand this case to the Board of Magistrates for the reasons set forth in the WCAC dissenting opinion. On remand, the magistrate shall determine, on the basis of the existing record, whether the plaintiff met her burden of proving that her wage loss following her retirement was due to her work-related disability, rather than her retirement. MCL 418.301(4); *Sington v Chrysler Corp*, 467 Mich 144, 160-161 & n 11 (2002).

MARILYN KELLY and HATHAWAY, JJ., would deny leave to appeal.

PEOPLE v HERNANDEZ-PEREZ, No. 143543; Court of Appeals No. 297917. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals. The statements made on the record regarding the potential length of the defendant's sentence could not reasonably have led him to believe that the plea agreement had a sentencing component, specifically a promise that he would be sentenced to one year in the county jail. The Kent Circuit Court judge clearly stated that no promise had been made about the sentence the defendant would receive. The defendant is therefore not entitled to withdraw his plea.

CLANCY v MILLENNIUM PAINTING COMPANY, No. 143647; Court of Appeals No. 300926. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse that portion of the decision of the Workers' Compensation Appellate Commission (WCAC) finding Millennium Painting Company and Liberty Mutual Insurance Company liable for payment of benefits for the reasons stated in the WCAC dissenting opinion, and we remand this case to the Michigan Compensation Appellate Commission, as successor to the Workers' Compensation Appellate Commission, for entry of an order requiring payment of the plaintiff's benefits from RCO Engineering, Inc., and Safeco Insurance Company of America based on a July 28, 2001, date of injury. In all other respects, leave to appeal is denied.

In re BRINKER, No. 143871; Court of Appeals No. 302305. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Crawford Circuit Court for the ministerial task of correcting the February 18, 2009, order of adjudication (a copy of which was not included in the circuit court file) to reflect that the circuit court assumed jurisdiction over the minor child based solely on the admissions of the respondent-mother. According to the transcript of the pretrial hearing on February 12, 2009, respondent-father did not enter a plea or make any admissions to the allegations in the neglect petition. In all other respects, leave to appeal is denied. The motion for peremptory reversal is denied.

Oral Argument Granted in Cases Pending on Application for Leave to Appeal Entered November 23, 2011:

PALETTA v OAKLAND COUNTY ROAD COMMISSION, No. 143663; Court of Appeals No. 298238. We direct the clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). At oral argument, the parties shall address whether the accumulation of gravel, natural or otherwise, on the paved roadway is actionable under the highway exception to the governmental tort liability act, MCL 691.1402, and, in particular, whether such an accumulation of gravel implicates the defendant-appellant's duty to maintain the highway in "reasonable repair" within the meaning of MCL 691.1402(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

In re GORDON, No. 143673; Court of Appeals No. 301592. We direct the clerk to schedule oral argument on whether to grant the application or take other action. MCR 7.302(H)(1). At oral argument, the parties shall address (1) whether the notice requirements of § 1912(a) of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq.*, are invoked, such that the family court knows or has reason to know that an Indian child is involved in an involuntary child protective proceeding, when, as occurred here, the respondent mother stated at the preliminary hearing that her parents were tribal members but she was not; (2) if so, whether the Department of Human Services and the family court are under a duty to make a complete record of their compliance with the notice requirements of the ICWA; and (3) whether a parent can waive a minor child's status as an "Indian child" under the ICWA, 25 USC 1903(4), or waive compliance with the federal law's requirements, and, if so, whether the respondent mother's statement on the record that her family had been notified directly by the tribe that they were not entitled to money or benefits constituted a waiver. The parties may file supplemental briefs within 28 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied November 23, 2011:

ENGENIUS, INC v FORD MOTOR COMPANY, No. 141977; Court of Appeals No. 290682. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of March 9, 2011. The application for leave to appeal the July 29, 2010, judgment of the Court of Appeals is denied.

NORRIS v POLICE OFFICERS FOR THE CITY OF LINCOLN PARK, No. 142962; reported below: 292 Mich App 574.

MARILYN KELLY, J., would reverse and remand for trial.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v FLORIOS, No. 143185; Court of Appeals No. 303010.

PEOPLE v JOHN SIMS, No. 143207; Court of Appeals No. 302764.

FINKBEINER v CLINTON TOWNSHIP, No. 143265; Court of Appeals No. 297113.

HATHAWAY, J., would grant leave to appeal.

BURLESON v DEPARTMENT OF ENVIRONMENTAL QUALITY, No. 143286; reported below: 292 Mich App 544.

GOODMAN v 1012, INC, Nos. 143317 and 143318; Court of Appeals Nos. 296348 and 296349.

MARILYN KELLY, J., would grant plaintiff's application for leave to appeal.

SORANNO v ABBAS, No. 143319; Court of Appeals No. 296517.

PEOPLE v SPENCER, No. 143325; Court of Appeals No. 303807.

SHAW v EATON CORPORATION, No. 143346; Court of Appeals No. 300389.

MARKMAN, J. (*concurring*). Although I am troubled by the magistrate's findings, particularly with respect to plaintiff having suffered a mental disability under MCL 418.301(2), given that the only testimony on this point was that plaintiff felt "overwhelmed" and "anxious" due to his employer's purported lack of concern regarding his complaints that a fellow employee had not been properly trained, and plaintiff's psychiatrist's opinion that such feelings prevented plaintiff from holding gainful employment, I nonetheless reluctantly concur with the instant order of denial. For purposes of review in this Court, factual findings by the magistrate and the Workers' Compensation Appellate Commission are treated as conclusive, in the absence of fraud. *Mudel v Great Atlantic & Pacific Tea Co*, 462 Mich 691, 701 (2000).

MORRIS v BLUE CROSS BLUE SHIELD OF MICHIGAN, No. 143432; Court of Appeals No. 296343.

PEOPLE v BERGEY, No. 143505; Court of Appeals No. 303827.

In re HUDSON, No. 144014; reported below: 294 Mich App 261.

In re WOLVERTON/SMITH MINORS, No. 144020; Court of Appeals No. 303480.

Reconsideration Denied November 23, 2011:

MCCARTHY v SOSNICK, Nos 142461 and 142462; Court of Appeals Nos. 300159 and 300160. Leave to appeal denied at 489 Mich 900. On the Court's own motion, we conclude that the motions filed by plaintiff-appellant Patrick McCarthy on May 13, 2011, are frivolous and vexatious. MCR 7.316(D). Mr. McCarthy is ordered to pay the Clerk of this Court $500 within 28 days of the date of this order. We direct the Clerk of this Court not to accept any further filings from Mr. McCarthy in any noncriminal matter until he has made the payment required by this order.

Statements Regarding Decisions on Motion for Disqualification Entered November 30, 2011:

In re JAMES, No. 143942.

YOUNG, C.J. Judge Sylvia James has moved for my disqualification in this Judicial Tenure Commission (JTC) matter. As I am not personally biased for or against Judge James and see no other legitimate justification for my disqualification, I deny Judge James' motion. I offer the following explanation for my declination.

The principal argument Judge James advances in opposition to my (indeed, to all seven justices') participation in this JTC matter is that on April 13, 2011, this Court, exercising its powers of superintending control, took administrative control of the 22nd District Court and placed Judge James (its chief and only judge) on administrative leave. That

action followed completion of an audit conducted by the Supreme Court Administrative Office (SCAO) that revealed irregularities in the district court's financial records and practices.[1]

As our order of April 13, 2011, plainly states, Judge James was placed on a paid *administrative* leave. Thus, contrary to Judge James' assertion, the Court did not "suspend" her, nor did it exercise any powers listed in Const 1963, art 6, § 30 in placing her on administrative leave.[2] Rather, placing Judge James on a paid administrative leave was an exercise of the Court's superintending control powers, which arise under Const 1963, art 6, § 4.[3] The Court exercised its superintending control powers to protect the public and the integrity of the district court until such time that an assessment of the implications of the audit could be determined. Administrative leave is not a disciplinary action, nor is the Court's power to require a judge to take an administrative leave grounded in Const 1963, art 6, § 30.

This is an important distinction—and one that Judge James entirely fails to appreciate in making her motion to disqualify. The Supreme Court's responsibility is to ensure that the courts of this state are functioning properly, within the law, and according to the Court's rules. The administrative leave the Court ordered was in service of that responsibility.[4] The separate question as to whether Judge James committed any ethical breaches is, in the first instance, a responsibility of the JTC to assess under Const 1963, art 6, § 30, and that is the process the JTC has begun in filing a complaint against Judge James.

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[1] Even if the information contained in the SCAO audit were a proper basis for disqualification—which it is not—the SCAO audit results in this case were made public. Thus, Judge James' claim that I and other members of the Court will be called as witnesses in her JTC proceeding is baseless because none of us have any unique or personal information about the claims and charges the JTC has leveled against her.

[2] Const 1963, art 6, § 30(2) provides that

> [o]n recommendation of the judicial tenure commission, the supreme court may censure, suspend with or without salary, retire or remove a judge for conviction of a felony, physical or mental disability which prevents the performance of judicial duties, misconduct in office, persistent failure to perform his duties, habitual intemperance or conduct that is clearly prejudicial to the administration of justice.

[3] Const 1963, art 6, § 4 provides that "[t]he supreme court shall have general superintending control over all courts . . . ."

[4] In *In re Hathaway*, 464 Mich 672, 684 n 8 (2001), we noted this very point in describing our responsibility under Const 1963, art 6, § 4:

> [I]ndependent of Const 1963, art 6, § 30, which the people of Michigan added to the constitution in 1968, this Court has general superintending control of all Michigan courts. Const

For these reasons, I deny Judge James' motion to disqualify me.

CAVANAGH, J. In this Judicial Tenure Commission proceeding, Judge Sylvia A. James moves for my disqualification based on allegations that my participation would violate MCR 2.003(C)(1)(a), (b), and (c). Because I am not personally biased for or against Judge James, because there are no other grounds for my disqualification, and for the reasons set forth in the Chief Justice's statement responding to this same motion, I deny the motion.

MARILYN KELLY, J. In response to Judge Sylvia A. James' motion for my disqualification, I deny the request as there exists no basis for my recusal. I am not actually biased against Judge James, and I am able to judge the matter brought against her with an open mind.

MARKMAN, J. Judge Sylvia James has moved for my disqualification in this matter based on her allegations that my participation in placing her on administrative leave would violate MCR 2.003(C)(1)(a), (b), and (c). Because I am not personally biased in this matter, because there are no other grounds for my disqualification, and for the reasons well set forth in the Chief Justice's statement responding to this same motion, I would deny the motion.

HATHAWAY, J. Judge Sylvia James has moved for my disqualification in this Judicial Tenure Commission (JTC) matter. Judge James argues that I should disqualify myself based on this Court's order placing her on administrative leave. That action followed the completion of an audit conducted by the Supreme Court Administrative Office, and the audit results were made public. I am not personally biased against Judge James, and the mere fact that I voted to place Judge James on administrative leave does not raise an appearance of bias. See MCR 2.003. Additionally, I have formed no opinion on the allegations raised by Judge James regarding the manner in which her administrative leave was carried out or enforced. I expect that all allegations and responses will be fully and fairly addressed in the JTC investigation and any subsequent proceedings. Because I am not personally biased for or against Judge James and see no justification for my disqualification, I deny Judge James's motion.

MARY BETH KELLY, J. In this Judicial Tenure Commission proceeding, Judge Sylvia A. James moves for my disqualification based on allegations that my participation would violate MCR 2.003(C)(1)(a), (b), and (c). Because I am not personally biased for or against Judge James, because

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1963, art 6, § 4. This provision is a broad grant of constitutional authority to take necessary action, short of the outright removal of a judge. [Citations omitted.]

Indeed, in *Ransford v Graham*, 374 Mich 104, 108 (1964), this Court indefinitely "enjoin[ed] [a judge] from exercising the powers and duties of the office" "in the exercise of its powers of 'general superintending control over all inferior courts,' conferred by Michigan Constitution of 1908, art 7, § 4 [now Const 1963, art 6, § 4], for the purpose of protecting the purity of judicial processes and maintaining public confidence in the administration of justice."

there are no other grounds for my disqualification, and for the reasons set forth in the Chief Justice's statement responding to this same motion, I deny the motion.

ZAHRA, J. In this Judicial Tenure Commission proceeding, Judge Sylvia A. James has moved for my disqualification. Judge James has failed to substantiate any basis for my recusal. Because I have no actual bias for or against Judge James and there is no appearance of impropriety, nor do any other grounds exist for my disqualification, I deny Judge James' motion.

Leave to Appeal Denied November 30, 2011:

CROTEAU v AUTO-OWNERS INSURANCE COMPANY, No. 144094; Court of Appeals No. 306856.

Summary Disposition December 2, 2011:

PEOPLE v REGINALD LEWIS, No. 140704; reported below: 287 Mich App 356. By order of February 4, 2011, the application for leave to appeal the January 12, 2010 judgment of the Court of Appeals was held in abeyance pending the decision in *People v Bryant*, 483 Mich 132 (2009), cert gtd 559 US ___; 130 S Ct 1685; 176 L Ed 2d 179 (2010). On order of the Court, the case having been decided on April 18, 2011, *Michigan v Bryant*, 562 US ___; 131 S Ct 1143; 179 L Ed 2d 93 (2011), the application is again considered. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we affirm the result reached by the Court of Appeals, but vacate that part of the Court of Appeals' opinion holding that the autopsy report was not testimonial and, therefore, that its admission did not violate the defendant's Sixth Amendment right to be confronted with the witnesses against him. In particular, we disagree with the Court of Appeals' reliance on MRE 803(8) and its determination that the autopsy report was not prepared in anticipation of litigation, see *Bullcoming v New Mexico*, 564 US __; 131 S Ct 2705; 180 L Ed 2d 610 (2011). Nonetheless, we agree that the admission of the report was not outcome determinative. The motions to file supplemental authority are granted.

MARILYN KELLY, J. (*concurring*). I concur in the Court's order vacating part of the Court of Appeals published opinion and affirming defendant's conviction. I do so because I believe that at least some portions of the Court of Appeals' analysis of the Confrontation Clause issue presented are clearly erroneous.

However, I concur only with great reluctance because I would prefer to grant leave to appeal. The Court should consider whether admission of the contents of an autopsy report through testimony of a medical examiner who did not prepare the report constitutes inadmissible testimonial hearsay. This is a jurisprudentially significant question that has divided courts across the country.[1] Hearing oral argument would allow the Court to determine to

[1] Compare *Wood v State*, 299 SW3d 200 (Tex App, 2009) (finding a Confrontation Clause violation); *State v Locklear*, 363 NC 438 (2009)

what extent the Court of Appeals erred and to explicitly decide the constitutional question presented. I note that, by vacating the Court of Appeals' Confrontation Clause analysis and affirming on alternate grounds, we are *not* deciding whether the autopsy report constituted testimonial hearsay evidence.

Order Staying Precedential Effect Entered December 2, 2011:

PEOPLE V NUNLEY, No. 144036; reported below: 294 Mich App 274. On order of the Court, the motion for immediate consideration is granted. The motions of the Attorney General to intervene and to stay the precedential effect of the published Court of Appeals opinion are granted. The motion to enlarge the record on appeal and the application for leave to appeal the October 13, 2011, judgment of the Court of Appeals remain pending.

Leave to Appeal Denied December 2, 2011:

PETERMAN V AUTO-OWNERS INSURANCE COMPANY, No. 143335; Court of Appeals No. 301174.

In re AEP, No. 144019; Court of Appeals No. 303369.

Order Declining to Answer Certified Questions Entered December 2, 2011:

In re CERTIFIED QUESTIONS FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN (LIGHTHOUSE NEUROLOGICAL REHABILITATION CENTER V ALLSTATE INSURANCE COMPANY), No. 143287. The questions certified by the United States District Court for the Eastern District of Michigan are considered, and the Court respectfully declines the request to answer the certified questions.

YOUNG, C.J. (*concurring*). I decline to answer the questions certified by the United States District Court for the Eastern District of Michigan because I believe that Michigan Court of Appeals caselaw[1] has correctly construed MCL 500.3105(4) to require that an injured person subjec-

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(same), with *People v Lewis (On Remand)*, 287 Mich App 356 (2009) (opinion below) (admission of autopsy report prepared by nontestifying medical examiner did not violate Confrontation Clause); *People v Hall*, 923 NYS 2d 428, 430 (NY AD 1, 2011) (noting that *Melendez-Diaz* did not explicitly hold that autopsy reports are testimonial).

[1] See, for example, *Frechen v Detroit Auto Inter-Insurance Exchange*, 119 Mich App 578 (1982); *Mattson v Farmers Ins Exchange*, 181 Mich App 419 (1988); *Bronson Methodist Hospital v Forshee*, 198 Mich App 617 (1993). This construction of this statute has prevailed in Michigan for nearly thirty years.

tively intend the injury, not merely the act, in order for an insurer to be relieved of its obligation to pay personal protection insurance benefits. MCL 500.3105(4) states:

> Bodily injury is accidental as to a person claiming personal protection insurance benefits unless suffered intentionally by the injured person or caused intentionally by the claimant. Even though a person knows that bodily injury is substantially certain to be caused by his act or omission, he does not cause or suffer injury intentionally if he acts or refrains from acting for the purpose of averting injury to property or to any person including himself.

The first sentence of the statutory provision clearly indicates that bodily injury is accidental "unless suffered intentionally by the injured person . . . ." It is the injury that must be intentional, as the first sentence of the statute simply does not contemplate the injury-causing act or omission. The second sentence of the statutory provision is not an exception to the broad proclamation contained in the first sentence, but merely describes an injury that *continues* to be "accidental" under the No-Fault Act. Where a "person knows" that bodily injury is "substantially certain" to be caused by his actions, but he acts "for the purpose of averting injury to property or to any person," the resulting injury is not intentional.[2]

I see no basis to conclude that an injury is suffered intentionally, and that personal protection insurance benefits may be denied, where a person engages in an intentional act where injury is substantially certain to occur. Because I believe that Michigan Court of Appeals caselaw accurately interprets the statutory provision, I respectfully decline to answer the certified questions.

Finally, I wish to respond to the dissenting justice's suggestion that the decision from the federal district court judge construing this statute "will effectively become the law of this state . . . ." I concede that the

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[2] Indeed, if there were any question regarding whether Mr. Carter's injuries were intentionally inflicted, the second sentence of the statutory provision appears to squarely apply to the facts of this case. According to the deposition testimony of a disinterested eyewitness, Mr. Carter's girlfriend intentionally attempted to hit him with her automobile. Carter ran through a public park, a vacant lot, and a public street while being chased by Ms. Whitley's automobile before Carter climbed onto it in an effort to avoid being struck by the automobile. The automobile abruptly accelerated and braked several times in an effort to throw Carter off the vehicle. While Carter attempted to hang onto the vehicle, his efforts were unsuccessful, resulting in his catastrophic injuries. Thus, assuming arguendo that Carter knew that his act of climbing onto his girlfriend's car was "substantially certain" to result in the severe head injuries sustained, his actions appear to have been taken for the very *purpose* of self-preservation and averting injury to himself.

federal judge has indicated that he might be inclined to ignore our published Court of Appeals precedent. However, contrary to the dissent's assertion, if the federal district court chooses to ignore the accurate interpretation of the statutory provision provided by Michigan Court of Appeals caselaw, such a decision will affect *only the parties* in that federal case. Until this Court overrules or modifies the relevant Court of Appeals caselaw, all Michigan courts are obligated to follow it. See MCR 7.215(C) and (J)(1).

This legal fact alone explains why this Court should not expend its limited resources in an attempt to accommodate a federal court judge—even one who indicates that he might be unwilling to follow caselaw that is binding on every court in Michigan.

MARKMAN, J. (*dissenting*). In dissenting from this Court's increasingly regular decisions not to certify questions from the federal courts, I can do little except to repeat my concerns as to the cost of such decisions for sound constitutional government and the interests of Michigan and its citizens.

> When this Court, as it now does, refuses to answer a question certified to it by a federal court, the following consequences arise: (a) we undermine the interests of the people of this state in having significant questions of Michigan law resolved by courts which are accountable to the people of this state; (b) we erode the sovereign interests of this state in retaining control over the interpretation of its own laws, and transfer such control to a lower court of a different sovereign; (c) we weaken our system of judicial federalism in which even in those cases in which a federal court must apply state law, the federal court is obligated to defer to state court interpretations of that law; (d) we place Michigan on an unequal footing with the majority of other states of the Union whose highest courts routinely respond to certified questions and which employ the certification process as one important means by which to maintain the sovereign institutions of their states; and (e) we fail to demonstrate comity and cooperation with a federal court, which is acting in the circumstances to show respect for the role of a state court in giving authoritative meaning to the laws of its own state.
>
> The upshot of the majority's decision will be that an undecided, and significant, question of Michigan law will be decided, not by a judicial body established under the Constitution of this state, not by a judicial body accountable to the people of this state, and not by a judicial body comprised of judges selected by the people of this state, but by a federal district court . . . . And when the decision of that district court is finally rendered, it will not be only the litigants in this case who will be affected by our failure to have exercised our responsibility to maintain the integrity of our state institutions, but it will be the "general citizenry of Michigan, which in order to avoid litigation will tend to conform their conduct to what they understand as current law [of Michigan], the law of the federal court[.]" *In re Certified Question*, 472 Mich 1225, 1238 (2005) (MARKMAN, J.,

> dissenting). Unlike the great number of federal judicial decisions over recent decades that have tended to weaken the role of state judiciaries relative to their federal counterparts, today's weakening of judicial federalism is the result, not of a federal court decision, but of a state court decision. It is an entirely self-inflicted wound. [*In re Certified Question*, 489 Mich 870, 871 (2011) (MARKMAN, J., dissenting).]

These concerns are especially pronounced in the instant case in which the federal district court has certified the question, yet in which there is a reasonably clear line of Michigan *Court of Appeals* precedents. See MCR 7.305(B)(1) (a federal court may certify a question to this Court "that Michigan law may resolve and that is not controlled by Michigan *Supreme Court* precedent") (emphasis added). Thus, although the concurring justice himself believes that "Michigan Court of Appeals caselaw has correctly construed" the law in dispute, it now seems reasonably likely that a decision will ultimately emerge from the federal court that by the concurring justice's own lights: (a) is not in accord with the law of this state; (b) yet will effectively become the law of this state; and (c) will effectively become the law of this state, not by any decision of a court charged under the United States Constitution with authoritative jurisdiction over the interpretation of Michigan law, but by a decision of a federal court which has unsuccessfully sought out by its certified question the guidance of the highest court of this state.

Here, the federal district court is acting in accordance with federal law in not necessarily deferring to Michigan Court of Appeals precedents. See *Dale Baker Oldsmobile, Inc v Fiat Motors of North America*, 794 F2d 213, 218 (CA 6, 1986) (observing that federal courts are "not bound by a decision of an intermediate state appellate court when [they] are convinced that the highest state court would decide differently"). The federal district court has stated that it "is not obligated to follow Michigan Court of Appeals' interpretation of the statute," but rather must undertake a "considered educated guess as to what conclusion would most likely be reached on the issue by the Michigan Supreme Court," and "it is far from clear that the Michigan Supreme Court, if it were to consider the issue, would adopt the Court of Appeals' [precedents]." In my judgment, the district court is acting responsibly, and respectfully toward the judicial system of this state, in attempting to avoid such speculation by certifying the present question. Indeed, it is demonstrating greater respect for the values of judicial federalism than is this Court itself in rejecting such certification.

Which tribunal is in a better position to decide whether this Court would, in fact, decide the certified question differently than the Court of Appeals—the federal district court or this Court? And which tribunal is in a better position to give meaning to Michigan law—the federal district court or this Court? Because I believe, as does the

federal district court itself, that the answer to both of these questions is clearly this Court, I would grant the federal court's request to answer the certified question.

Summary Disposition December 7, 2011:

TORRES v FERROUS PROCESSING & TRADING COMPANY, No. 143408; Court of Appeals No. 300399. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Michigan Compensation Appellate Commission, as successor to the Workers' Compensation Appellate Commission, to address the defendant's motion to dismiss. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

MARILYN KELLY and HATHAWAY, JJ., would deny leave to appeal.

DEPARTMENT OF CIVIL RIGHTS v MICHIGAN HIGH SCHOOL ATHLETIC ASSOCIATION, No. 143798; Court of Appeals No. 305894. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted of whether the trial court abused its discretion by granting plaintiff's motion for a preliminary injunction, *Freeman v Mitchell*, 198 Mich 207, 210 (1917), after considering de novo the following threshold issues: (1) whether the Michigan High School Athletic Association (MHSAA) is a "state actor" for purposes of the Fourteenth Amendment and 42 USC § 1983, see *Brentwood Academy v Tennessee Secondary School Athletic Ass'n*, 531 US 288, 303 (2001); (2) whether, under the Elliott-Larsen Civil Rights Act, MCL 37.2101, *et seq*., the MHSAA provides a "public service" or constitutes a "place of public accommodation," MCL 37.2301; and (3) whether the MHSAA's rules categorize persons on the basis of an inherently suspect characteristic or jeopardize the exercise of a fundamental right; and if not, whether there is a rational basis for the MHSAA's rules. See generally, *Nordlinger v Hahn*, 505 US 1, 10 (1992). The motion for stay is denied. We do not retain jurisdiction.

MARILYN KELLY and HATHAWAY, JJ., would deny leave to appeal.

Leave to Appeal Granted December 7, 2011:

JOHNSON v RECCA, No. 143088; reported below: 292 Mich App 238. the application for leave to appeal the April 5, 2011, judgment of the Court of Appeals is considered, and it is granted, limited to the issue whether MCL 500.3135(3)(c), which permits an injured person to recover excess damages for allowable expenses, work loss, and survivor's loss in third-party actions, includes within its scope the cost of replacement services rendered more than three years after the date of the motor vehicle accident.

The Michigan Association for Justice and Michigan Defense Trial Counsel, Inc., are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented may move the Court for permission to file briefs amicus curiae.

PEOPLE v RAPP, Nos. 143343 and 143344; reported below: 293 Mich App 159. The parties shall include among the issues to be briefed: (1) whether Michigan State University Ordinance 15.05 is facially unconstitutional under *City of Houston v Hill*, 482 US 451 (1987), and (2) whether MCR 7.101(O) allows taxation of costs in criminal cases appealed in the circuit court.

Persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

PEOPLE v TRAKHTENBERG, No. 143386; Court of Appeals No. 290336. The parties shall address (1) whether the "attorney judgment rule," as applied in a related case involving a claim of legal malpractice made by the defendant against his trial counsel in this criminal case, can be applied under a collateral estoppel theory to bar substantive review of evidence adduced at a hearing ordered by this Court to determine whether the defendant was denied his constitutional right to effective assistance of counsel and, if not, (2) whether, in light of the record developed on remand, the defendant is entitled to a new trial on the ground that he was denied his constitutional right to effective assistance of counsel, and (3) whether the defendant is entitled to a new trial on the basis of newly discovered evidence.

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

DOUGLAS v ALLSTATE INSURANCE COMPANY, No. 143503; Court of Appeals No. 295484. The parties shall include among the issues to be briefed (1) whether the Court of Appeals erred in remanding this case to the trial court for further proceedings regarding the amount of incurred expenses for attendant care from November 7, 2006, to November 18, 2009, after finding that the trial court clearly erred in awarding attendant care benefits to the plaintiff without requiring sufficient documentation to support the daily and weekly hours underlying the award; (2) whether the plaintiff presented sufficient proofs at trial to support the trial court's award of attendant care benefits for the period before November 7, 2006; (3) whether activities performed by Katherine Douglas constituted attendant care under MCL 500.3107(1)(a) or replacement services under MCL 500.3107(1)(c); and (4) whether the trial court clearly erred in awarding attendant care benefits at the rate of $40 per hour.

Leave to Appeal Denied December 7, 2011:

GARDNER v FERNDALE LABORATORIES, INC, No. 143445; Court of Appeals No. 300487.

PEOPLE v CUTLER, No. 143482; Court of Appeals No. 296078.

CLOCK v KEMP, No. 143637; Court of Appeals No. 296596.

MARILYN KELLY and HATHAWAY, JJ., would reverse the judgment of the Court of Appeals for the reasons stated in the Court of Appeals dissenting opinion.

Statement Regarding Decision on Motion for Disqualification Entered December 7, 2011:

PEOPLE v WINBURN, No. 143914; Court of Appeals No. 303223.

MARKMAN, J. Defendant filed a motion pursuant to MCR 2.003, seeking my disqualification because he alleged that the instant appeal pertaining to his conviction for a 1990 murder involves overlapping facts with a criminal investigation of defendant, which I was alleged to have reviewed in 1992 as the United States Attorney. I denied this motion, explaining that "defendant has established no connection between the facts of the 1990 murder that are currently in dispute and the circumstances of the drug investigation in 1992, except that defendant was involved in both matters." Defendant has now filed a motion for "clarification of material facts. In this motion, defendant expands upon the record and presents new evidence supporting his previously unexplained and unsubstantiated assertion that there are "overlapping facts" between the two matters. This evidence, in my judgment, does establish a connection between the instant appeal—in which I would participate as a judge—and the prior criminal investigation—in which I participated as prosecutor. Under these circumstances, I believe that my disqualification is warranted, and accordingly I recuse myself from the consideration of this matter.

Summary Disposition December 9, 2011:

FINDLEY v DAIMLERCHRYSLER CORPORATION, No. 141858; reported below: 289 Mich App 483. On October 4, 2011, the Court heard oral argument on the application for leave to appeal the August 24, 2010, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, and we reinstate the March 12, 2009, order of the Workers' Compensation Appellate Commission (WCAC). The Court of Appeals erred in concluding that *Aquilina v Gen Motors Corp*, 403 Mich 206 (1978), remained valid after the 1985 amendments to the Worker's Compensation Disability Act, MCL 418.101 *et seq*.

In contrast with the statutory mechanism in place at the time *Aquilina* was decided, the WCAC is now required to treat as conclusive the factual findings of the magistrate where those findings are "supported by competent, material, and substantial evidence on the whole record." MCL 418.861a(3). Because the WCAC must now give deference to the magistrate's factual determinations, and may no longer engage in de novo fact-finding, a WCAC decision does not require a "true majority" "decision based on stated facts." *Aquilina*, 403 Mich at 214.

CAVANAGH, J. (*dissenting*). I respectfully dissent from the majority's decision to reverse the judgment of the Court of Appeals. Plaintiff was allegedly injured at work and subsequently filed a worker's compensation claim, which was denied by the magistrate. The Workers' Compensation

Appellate Commission (WCAC) later affirmed in a split decision, where one commissioner issued the lead opinion, the second commissioner concurred only in the lead opinion's result, and the third commissioner dissented. Plaintiff appealed and the Court of Appeals, relying on MCL 418.274(8) and *Aquilina v Gen Motors Corp*, 403 Mich 206 (1978), vacated and remanded for issuance of a "true majority" decision. *Findley v DaimlerChrysler Corp*, 289 Mich App 483 (2010).

In my view, the Court of Appeals did not clearly err in applying *Aquilina* under the facts of this case. In *Aquilina*, the Court held that where two members of the predecessor to the WCAC concurred only in the result of what was designated as the "controlling opinion," the opinion was not a "majority *decision*" as required by the Worker's Disability Compensation Act of 1969. *Aquilina*, 403 Mich at 212. Notably, in rendering its holding, *Aquilina* focused on the review responsibilities of appellate courts, see *id*. at 213-214, explaining that appellate courts "cannot discharge [their] reviewing responsibilities unless a *true* majority reaches a decision based on stated facts," and specifically noting that "[a] decision is not properly reviewable when some of the majority concur only in the result and do not state the facts upon which that result is based." *Id*. at 214.[1] Although the 1985 legislative amendments brought reforms to the Worker's Disability Compensation Act, as the Court of Appeals recognized, the review function of appellate courts remains the same. See, e.g., *Holden v Ford Motor Co*, 439 Mich 257, 262 (1992). And even after the legislative amendments, this Court has generally recognized the importance of a "carefully constructed opinion by the WCAC" in facilitating appellate review. *Id*. at 268-269. Thus, under the facts of this case, I do not believe that the Court of Appeals clearly erred in applying *Aquilina* where, as in *Aquilina*, a commissioner in the majority did not issue a separate opinion but, instead, concurred only in the result reached by the lead opinion. Accordingly, I would deny leave to appeal.

MARILYN KELLY, J., joined the statement of CAVANAGH, J.

HATHAWAY, J. (*dissenting*). I dissent from the majority's decision in this matter. Leave to appeal was not granted in this case. Having reviewed the limited briefing and having heard limited oral argument, I would grant leave to appeal because I believe that the Court would benefit from plenary review of the issues before rendering a decision.

Leave to Appeal Denied December 9, 2011:

PEOPLE v ROSE, No. 141659; reported below: 289 Mich App 499. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of February 2, 2011. The application for leave to appeal the July 1, 2010, judgment of the Court of Appeals is denied.

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[1] In order to assist appellate courts in "effectively discharging their responsibilities," *Aquilina* further encouraged concurring board members to articulate whether they agree with the legal standards and rationale applied in reaching the decision. *Aquilina*, 403 Mich at 214.

MARILYN KELLY, J. (*dissenting*). I dissent from the order vacating our February 2, 2011, order granting leave to appeal and denying defendant's application for leave to appeal. The trial court violated defendant's due process right to be presumed innocent when it permitted a child witness to testify behind a witness screen that prevented her from viewing defendant. The screen branded defendant with "an unmistakable mask of guilt"[1] by suggesting to the jury that the witness had a good reason to fear viewing defendant; namely, that defendant had abused her. This error was compounded when the trial court gave no instruction to the jury directing it not to draw any inference adverse to defendant from the use of the screen. Accordingly, I would reverse the Court of Appeals' judgment and remand the case for a new trial.

FACTS AND PROCEDURAL HISTORY

Defendant was charged with four counts of first-degree criminal sexual conduct[2] and two counts of distributing obscene material to minors[3] based on allegations made by two children, JB and RB.[4] Both at the preliminary examination and at trial, the court allowed the prosecutor to place a protective screen between JB and defendant while JB was testifying. Defendant and defense counsel could see JB through the screen, but the screen prevented JB from seeing defendant. The screen did not prevent the jurors, judge, or most of the courtroom audience from seeing JB or prevent her from viewing them. Defense counsel objected to the screen but offered no alternative method for presenting JB's testimony. RB also testified but no screen was used. The jury convicted defendant as charged.

The Court of Appeals affirmed defendant's convictions.[5] It noted that use of a screen was not expressly permitted under MCL 600.2163a, which provides special procedures for presenting child witness testimony in certain cases. However, the panel held that the trial court could allow a screen pursuant to MRE 611(a), which gives the court authority to control the "mode and order" of interrogating witnesses.

The Court of Appeals also held that the use of the screen in this case did not violate defendant's constitutional right to confront witnesses.[6]

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[1] *Holbrook v Flynn*, 475 US 560, 571; 106 S Ct 1340; 89 L Ed 2d 525 (1986).

[2] MCL 750.520b.

[3] MCL 722.675.

[4] Defendant was initially also charged with one count of second-degree criminal sexual conduct and one count of accosting a child for immoral purposes. However, the prosecutor dismissed those charges at the close of her proofs because the facts necessary to sustain those charges had not been presented.

[5] *People v Rose*, 289 Mich App 499 (2010).

[6] US Const, Am VI; Const 1963, art 1, § 20.

The United States Supreme Court has recognized that a defendant's right to confrontation may bow to a compelling state interest, which includes "safeguarding the physical and psychological well-being of a minor."[7] The trial court must make a "case-specific" finding that the procedure is necessary to further that state interest.[8] Here, the Court of Appeals concluded that the trial court made sufficient findings that the screen was necessary to protect JB. It relied on the trial court's conclusion that there was a "high likelihood" that JB would suffer psychological damage if forced to testify without the screen.[9]

The Court of Appeals next rejected defendant's argument that the screen violated his right to due process by infringing on the presumption of innocence. The panel concluded that, unlike prison garb or shackles, the screen was not the type of device that would brand defendant with a mark of guilt. Thus, it held that use of the screen was not inherently prejudicial.

Moreover, the Court of Appeals reasoned that the jury could draw several inferences about why the witness was screened that would not be prejudicial to defendant. Those alleged non-prejudicial inferences included (1) the witness was afraid to view defendant because she was not being truthful, (2) the screen was being used to calm the witness's anxiety about appearing as a witness, and (3) as a general rule, child witnesses accusing a defendant of harm are fearful of the defendant.

Finally, the Court of Appeals concluded that, even if the screen was inherently prejudicial, its use was necessary to further an essential state interest. Therefore, it held that defendant's due process claim was without merit.

ANALYSIS

The United States Supreme Court has not addressed whether the use of a witness screen violates a defendant's due process right to a fair trial.[10] However, that Court has ruled that certain procedures are so inherently prejudicial that they are generally not permitted at trial.[11]

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[7] *Maryland v Craig*, 497 US 836, 852-853; 110 S Ct 3157, 111 L Ed 2d 666 (1990), quoting *Osborne v Ohio*, 495 US 103, 109; 110 S Ct 1691; 109 L Ed 2d 98 (1990).

[8] *Craig*, 497 US at 855.

[9] *Rose*, 289 Mich App at 516.

[10] *Coy v Iowa*, 487 US 1012, 1022; 108 S Ct 2798; 101 L Ed 2d 857 (1988) ("We find it unnecessary to reach appellant's due process claim."); see *id*. at 1034 (Blackmun, J., dissenting) ("Appellant also argues that the use of the screening device was 'inherently prejudicial' and therefore violated his right to due process of law. The Court does not reach this question . . . .").

[11] See *Illinois v Allen*, 397 US 337, 344; 90 S Ct 1057; 25 L Ed 2d 353 (1970) ("[N]o person should be tried while shackled and gagged except as

The test for whether a particular procedure is inherently prejudicial is whether there is an "unacceptable risk that impermissible factors will come into play."[12] Whether a given procedure creates such an unacceptable risk turns largely on whether there is a "wider range of inferences that a juror might reasonably draw" from the procedure other than to brand defendant "with an unmistakable mark of guilt."[13]

I conclude that the Court of Appeals erred in rejecting defendant's argument that the witness screen violated his right to due process by impinging on the presumption of innocence.[14] The only inference that a reasonable juror could draw from the use of the witness screen is that JB was afraid of defendant because he abused her. The Court of Appeals, the prosecutor, and amicus offered several alternative inferences that a juror might draw from the use of the screen. None of them withstands scrutiny.

First, the Court of Appeals stated that a reasonable juror might conclude that the child witness is being screened because she fears to look upon the defendant because she is not testifying truthfully. No reasonable juror could so conclude. Courts are not in the habit of protecting people who proffer perjured testimony. By allowing the screen to be placed between the witness and defendant, the court highlighted the witness's apparent fear of directly facing defendant. Permitting the screen sent the jury the message that the court deemed the witness to be worthy of protection from the defendant.

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a last resort."); *Estelle v Williams*, 425 US 501, 504-505; 96 S Ct 1691; 48 L Ed 2d 126 (1976) (it violates a defendant's due process right to a fair trial to compel a defendant to wear identifiable prison garb during trial).

[12] *Holbrook*, 475 US at 570, quoting *Williams*, 425 US at 505.

[13] *Id*. at 569, 571.

[14] Because I reach this conclusion, I do not address defendant's claim that the witness screen violated his constitutional right to confrontation. In addition, the screen may very well have violated defendant's *statutory* right to confrontation. MCL 763.1 provides that "[o]n the trial of every indictment or other criminal accusation, the party accused shall be allowed to be heard by counsel and may defend himself, and he *shall have a right to . . . meet the witnesses who are produced against him face to face.*" (Emphasis added.)

MCL 600.2163a provides apparent exceptions to the mandatory rule in MCL 763.1 that confrontation be "face to face." However, a witness screen is not among the enumerated exceptions. Moreover, in my view, MCL 600.2163a(19), which provides that "[t]his section is in addition to other protections or procedures afforded to a witness by law or court rule[,]" cannot justify allowing the screening procedure used in this case because no Michigan statute or court rule explicitly allows it. To allow the screen pursuant to a vague rule allowing trial courts to exercise "reasonable control over the mode and order of interrogating witness," MRE 611(a), as the Court of Appeals did here, vitiates the mandatory nature of MCL 763.1.

Second, the Court of Appeals, the prosecutor, and amicus curiae claim that a juror could reasonably infer from the screen that the witness is afraid of testifying "generally." This inference is more unreasonable than the first. The screen's only function in this case was to block JB's view of the defendant. She could still see the judge, the jury, the attorneys as they questioned her, and the rest of the courtroom. It is hardly a reasonable inference under those circumstances that the witness was afraid of testifying generally. The witness still testified in open court.

Finally, the Court of Appeals suggested that the screen was not inherently prejudicial because "anytime a child victim testifies against a defendant who is accused of harming the child victim, the jury is going to reasonably infer that the child has some fear of the defendant."[15] Implicit in this statement is the conclusion that a reasonable juror could infer that screening child witnesses in abuse cases is standard practice. This conclusion is problematic for a couple of reasons. First, it is undisputed that RB, the other child witness who testified in this case, was not screened. Second, the screen was not a permanent fixture in the courtroom and was not in place for the entire trial;[16] it was brought out only to shield JB while she testified.

The only remaining reasonable inference to be drawn from the screen is that JB was afraid to face the dangerous defendant because he had abused her. Thus, the use of the screen was inherently prejudicial.[17]

I also disagree with the Court of Appeals that, even if use of the screen was inherently prejudicial, it was justified by "an essential state interest specific to [this] trial."[18] Rather, the trial court "had available another equally effective method of protecting [the child witness] while procuring her testimony that would not have been inherently prejudicial to [defendant's] due process rights."[19] MCL 600.2163a gives trial courts numerous alternative ways of presenting child witness testimony, including rear-

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[15] *Rose*, 289 Mich App at 520.

[16] Contra MCL 600.2163a(16)(b) (allowing the courtroom to be rearranged so that the defendant is seated "as far from the witness stand as is reasonable and not directly in front of the witness stand," but requiring that the seating arrangement "shall be the same for all witnesses").

[17] It bears repeating that the trial court gave no instruction to the jury that it was to draw no inference from the use of the screen. Contra *Coy*, 487 US at 1035 (Blackmun, J., dissenting) ("[T]he trial court instructed the jury to draw no inference from the device . . . . *Given this helpful instruction*, I doubt that the jury-which we must assume to have been intelligent and capable of following instructions-drew an improper inference from the screen, and I do not see that its use was inherently prejudicial.") (emphasis added).

[18] *Holbrook*, 475 US at 569.

[19] *State v Parker*, 276 Neb 661, 674; 757 NW2d 7 (2008).

ranging the courtroom so that the child cannot see the defendant[20] or videotaping the child's testimony.[21] Each of these procedures, in contrast to the screen used in this case, would allow reasonable jurors to draw innocuous inferences rather than brand the defendant as guilty.[22] Thus, while the trial court allowed the screen to protect JB from trauma, it failed to "take steps" to "minimiz[e] the prejudice to [defendant]."[23]

Finally, today's order denying leave to appeal leaves Michigan among a scant minority of states that has sanctioned the use of witness screens in such a prejudicial manner. Although a few states allow the use of a screen, either by judicial decision or statute, most minimize the potential for prejudice by providing greater protection for a defendant's rights. For example, Alaska's statute allowing the use of "one-way mirrors" provides that the mirrors shall be placed so that the child does not have visual contact with the jury as well as the defendant.[24] Wisconsin courts have allowed the use of a witness screen where the child victim testifies on camera and is screened from the defendant, but the jury cannot see the screen.[25] The screening procedure used in this case had none of these protections.

CONCLUSION

Today's order leaves intact a clearly erroneous published opinion of the Court of Appeals. Moreover, it sanctions a constitutionally defective procedure for shielding child witnesses from their accusers despite the fact that the Legislature has endorsed other, constitutionally acceptable means of doing so. I dissent and would reverse the Court of Appeals' decision and remand this case for a new trial.

PEOPLE V JAMISON, No. 143233; reported below: 292 Mich App 440.

YOUNG, C.J. (*dissenting*). I respectfully dissent from the Court's order denying the application for leave to appeal. I would peremptorily reverse the Court of Appeals' decision on the sentencing guidelines issue. The Court of Appeals correctly interpreted and applied the phrase "domestic relationship" in MCL 777.40(1)(b). Since the defendant did not exploit a "domestic

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[20] MCL 600.2163a(16)(b).

[21] MCL 600.2163a(17).

[22] For example, unlike with the screen, a juror could reasonably infer that a child is being allowed to testify via videotape because he or she is scared of the courtroom setting.

[23] *Rose*, 289 Mich App at 523.

[24] Alas Stat 12.45.046(e).

[25] *State v Thomas (Thomas II)*, 150 Wis 2d 374, 389; 442 NW2d 10 (1989) ("The jury . . . never saw the screen when it viewed the video testimony. . . . Hence, there could be no prejudice as a result of using the screen at the taping session, because the jury never viewed the defendant as being walled off from the other participants.").

relationship" under MCL 777.40(1)(b), the circuit court should not have scored offense variable (OV) 10 at 10 points. However, it appears defendant engaged in "predatory conduct" under MCL 777.40(1)(a). By following the victim, directing him to pull over, and then attacking the victim when he parked on a side street, the defendant engaged in stalking behavior, which is precisely the type of "genuinely predatory conduct" that justifies scoring OV 10 at 15 points.[1] Moreover, this predatory conduct was directed at a victim who suffered from a readily apparent susceptibility to persuasion and temptation. The victim testified that he had previously dated the defendant, that they had enjoyed sexual encounters after the break up, and that he was hoping for another sexual rendezvous when the defendant directed him to pull over immediately before the offense. Finally, the defendant's preoffense conduct appears to have been for the purpose of victimization, as the defendant attacked the victim as soon as he complied with her demands to pull over. Thus, under *People v Huston* and *People v Cannon*,[2] there are grounds to score OV 10 at 15 points when the defendant is resentenced. Since there is an alternative basis to sustain the defendant's original sentence, I would peremptorily reverse the Court of Appeals on this question and allow the original sentence to stand.

MARILYN KELLY, J. (*dissenting*). I dissent from the order denying leave to appeal. I would grant leave to appeal to consider whether the Court of Appeals correctly interpreted the phrase "domestic relationship" in MCL 777.40(1)(b).

CITY OF ROOSEVELT PARK v POLICE OFFICERS LABOR COUNCIL, No. 143552; Court of Appeals No. 295588.

In re TURNER, No. 144018; Court of Appeals No. 303187.

Statement Regarding Decision on Motion for Disqualification Entered December 12, 2011:

LAWRENCE v BOARD OF LAW EXAMINERS, No. 144191.

ZAHRA, J. Plaintiff has filed an original action pursuant to MCR 7.304 asking this Court to implement superintending control power over the Board of Law Examiners. Plaintiff's complaint seeks review of the Board of Law Examiners' 2010 decision denying plaintiff's application for admission to the State Bar of Michigan. Because I was a member of the Board of Law Examiners and participated in the decision-making process that is the subject of plaintiff's complaint, I conclude that it is appropriate to disqualify myself. Therefore, I recuse myself from the consideration of this matter.

Leave to Appeal Denied December 14, 2011:

AFSCME COUNCIL 25 v STATE EMPLOYEES' RETIREMENT SYSTEM, MICHIGAN STATE EMPLOYEES ASSOCIATION v STATE EMPLOYEES' RETIREMENT SYSTEM, SERVICE EMPLOYEES INTERNATIONAL UNION v STATE EMPLOYEES' RETIREMENT SYSTEM, and MCNEIL v PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD, Nos. 143827, 143828, 143829, and 143830; Court of Appeals Nos. 302959, 302960, 302961, and 302962.

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[1] See *People v Huston*, 489 Mich 451, 462 n 7 (2011).

[2] *People v Cannon*, 481 Mich 152, 161-62 (2008).

Order of Interim Suspension Entered December 15, 2011:

In re JAMES, No. 143942. The petition for interim suspension is considered, and it is granted. The Honorable Sylvia A. James, Judge of the 22nd District Court, is suspended with pay until further order of this Court. In order to expedite the resolution of this matter, we order the Judicial Tenure Commission (JTC) and the master to coordinate their schedules to ensure that the JTC recommendation of action, if any, will be submitted to this Court within five months of the date of this order. See MCR 9.207(F) and 9.219(A).

YOUNG, C.J. (*concurring*). There is no gainsaying that the dissent's demand that Judge James' pay be withheld has a strong populist appeal. She has, after all, been publicly accused of very serious offenses. I write to explain why this appeal should be resisted.

In this Court's history, a judge accused of wrongdoing has been suspended without pay prior to the completion of the Judicial Tenure Commission (JTC) adjudicative process only under a very rare set of circumstances—where the misconduct had already been conclusively established, rendering the JTC's determination of misconduct largely irrelevant.[1] Here, the dissent would suspend the respondent without pay based on allegations, before her misconduct has been proven at a hearing. For the foregoing reasons, I believe that placing respondent on interim suspension without pay is inappropriate.[2]

The dissent asserts that the total amount of public funds respondent is alleged to have misappropriated is $131,030. However troubling, these are *allegations* rather than established fact; moreover, the allegations are *disputed* by Judge James.[3]

Because the allegations have not been tested and proven in a hearing, at this point it should not be assumed that the most serious allegations will be proved. Similarly, even if the lesser allegations are proved, it is not

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[1] There have been only three occasions where this Court has ordered a suspension without pay before the completion of the JTC hearing. Two involved judges who had been convicted of crimes prior to the resolution of judicial disciplinary proceedings. See *In re Callanan*, 419 Mich 376 (1984), and *In re Szymanski*, 394 Mich 798 (1975). In *In re Lawrence*, 417 Mich 1129 (1983), the third such matter, the judge *admitted* that he had not performed the duties of his judicial office.

[2] I do not need to address the question of our underlying authority to suspend a judge without pay prior to the JTC's determination of misconduct because I address *prudential* reasons why we should not exercise that authority in this case. The precedents of this Court establish a *prudential* limitation that we ought not exercise such authority when the underlying misconduct is contested. Unlike the dissenting justice, I believe that prudential limitation is a wise one that should be respected.

[3] This point is made more emphatic because the JTC has not even requested that respondent have her pay withheld pending resolution of the merits of its charges against her.

certain that the appropriate sanction would exceed the suspension from office that respondent will have already incurred by being placed on administrative leave as well as any sanction served in response to the JTC's petition to suspend.

The dissent cites three justifications favoring suspending respondent without pay: (1) a "potentially diminished regard for the self-disciplinary processes of the judiciary"[;] (2) the diminished likelihood of recovering "misappropriated public funds" for the City of Inkster; and (3) the diminished likelihood of recovering the misappropriated funds to provide "adequate restitution" to crime victims.

First, the entire thrust of the dissent is that more "discipline" needs to be meted out to Judge James by this Court now before the charges leveled against her are even heard by the JTC. The rationale for the dissent falters because the dissenter seeks either to make respondent an example (to prevent other judges from engaging in the kind of peculation with which she is charged)[4] or transform a disciplinary process into a restitution recovery mechanism. According to the dissent, the Court's failure to make this additional sanction will undermine regard for the judiciary and demonstrate that the Court is unconcerned about the seriousness of these charges. All of these concerns are without foundation or actually undermine important principles of due process that this Court ought always to vindicate.

In placing respondent on administrative leave earlier this year, this Court promptly responded to the results of the SCAO audit that showed some irregularities. The matter was then immediately turned over to the JTC for investigation. In so doing, this Court prevented any additional harm that the respondent *might* have caused by continuing to administer the 22nd District Court. Thus, suspension without pay is not related to the recovery of any funds that may have been misappropriated by Judge James prior to being placed on administrative leave. The dissenter does not dispute this fact, he merely ignores it because it undercuts his restitution argument.

Nor can it reasonably be said that this Court's failure to suspend respondent without pay does anything to diminish "the public regard for the self-disciplinary process." Withholding respondent's pay before completing the adjudicative process results in the very harm the dissent claims to fear—"diminished regard for the self-disciplinary processes of the judiciary." Indeed, where the material facts are in dispute, those concerned with the integrity of the judicial system and "the public regard for the self-disciplinary process" should *insist upon* permitting the JTC

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[4] The dissent's clear message to judges is that—whether guilty or not—they had better not stand *accused* of wrongdoing because the mere accusation of wrongdoing is enough to warrant withholding a judge's salary in order to "mitigate" the effects of alleged wrongdoing. Admittedly, this is a *very* strong message—challenging JTC allegations will impoverish you—and it treads perilously close to prejudging an accused's guilt; we ordinarily allow people accused of wrongdoing the benefit of a trial *before* sanctioning them.

process to conclude before the imposition of the punishment the dissent favors. While a lynch mob is surely effective in dispensing its view of justice without benefit of a trial, the judicial system is designed to be a bulwark against this and other forms of "mob justice." Consistent with our commitment to having guilt determined *after* a trial, the Court's action today both protects the public and maintains the integrity of the self-disciplinary process. Moreover, by order issued today, this Court has expedited the JTC proceedings to ensure that resolution of this matter occurs as quickly as possible.

The dissent, while purporting to understand the principles of our judicial disciplinary system, fails utterly to apply them. This is best illustrated by the dissent's inexorable focus on the desire to secure "restitution"—for the victims of crime and the citizens of Inkster. This restitutionary justification for withholding pay before a JTC adjudication is entirely without legal foundation in the judicial disciplinary system. As the dissent acknowledges, the purpose of judicial disciplinary proceedings "is not to impose punishment on the respondent judge, *or to exact any civil recovery*, but to protect the people from corruption and abuse on the part of those who wield judicial power."[5] However, this is *precisely* what the dissent seeks to accomplish—to exact a civil recovery for judicial wrongdoing.[6]

Significantly, and consistent with the principles stated above, Art 6 Sec 30 of our constitution makes no provision for restitution as a sanction, nor is such a sanction easily reconciled with those sanctions specifically enumerated. Consequently, it is not surprising that the JTC rules do not provide a mechanism for "restitution." Accordingly, the dissent's justification for suspending respondent without pay prior to the JTC process is premised on a reason that is *inappropriate* to the very purpose of judicial disciplinary proceedings. This is all made worse by the fact that the dissent exacts "restitution" *before* a determination of guilt.[7]

This case has gathered a fair bit of public notoriety in the media. Regardless, the role of the courts—and the role of the JTC process—is to ensure the rule of law. Media coverage is not grounds to end run the JTC process. While "sentence first—verdict afterwards" might satisfy the

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[5] *In re Jenkins*, 437 Mich 15, 28 (1991) (emphasis added).

[6] Under our rules, a disciplined judge may be ordered to pay costs and fees *to the commission*, but only where the judge makes misrepresentations or misleading statements *during the JTC adjudicatory* process. MCR 9.205(B).

[7] The right to restitution for victims is available only for *criminal acts* and this right has been established by statute. Needless to say, a JTC proceeding is not a criminal prosecution. I am aware of no basis for the citizens of Inkster to recover "restitution" under any circumstance based on the allegations lodged against Judge James, and the dissent provides none. However, the dissent is undeterred by these legal "trivialities" in its determination to make an "example" of the respondent.

Queen of Hearts,[8] I believe it is inappropriate to suspend respondent without pay when the underlying claims of misconduct are contested. Doing so disserves any Court aspiring to follow the rule of law.

MARKMAN, J. (*concurring in part and dissenting in part*). I respectfully dissent from the Court's order to the extent that it grants the Judicial Tenure Commission's (JTC's) petition for respondent's interim suspension *with* continued salary. Instead, I would order the suspension without salary, and have respondent's salary held in escrow pending the final resolution of her disciplinary proceedings.

The JTC's complaint alleges that respondent, the chief judge of the 22nd District Court in Inkster, has misappropriated approximately $131,000 in public funds. Specifically, the complaint alleges that she employed a checking account established for an alternative sentencing program, the Community Service Program (CSP), as "her personal slush fund." The JTC further alleges that 50% of the monies collected through CSP were required to be applied to crime victim restitution, and that this did not occur.

I would not allow the respondent to receive additional public funds during her present suspension—one predicated upon allegations of past misappropriations of public funds—and would instead hold her salary in escrow pending resolution of disciplinary proceedings. In my judgment, both the breadth and the explicitness of our authority under the Constitution make clear that there is constitutional warrant in this Court to undertake this action. Although I do not believe the majority acts unreasonably in choosing *not* to exercise this authority, I also do not believe that my decision to the contrary is unreasonable. By the time this matter is finally resolved by the Judicial Tenure Commission and this Court, respondent will have been provided between 12-15 months of additional salary, without having performed a single day of judicial service for the people of her District.

In light of this Court's "extraordinary" constitutional authority over matters of judicial discipline—an authority that is "bounded only by the exigencies which call for its exercise," and in light of our separate constitutional authority to "suspend [a judge] with or without salary," I believe this Court clearly possesses the authority to ensure that, where a judge has been alleged to have misappropriated public funds, reasonable precautions can be taken to ensure that if the allegations are eventually borne out, (a) the judge will not financially benefit by the misappropriation; and (b) the taxpayer and the intended beneficiaries of the public funds, in this case the victims of crime within Inkster, will be afforded some possibility of restitution. Reasonable precautions can be undertaken by a court in advance of trial even in a *criminal* matter to protect the interests of the public, and this Court's authority to uphold the integrity and reputation of the judiciary in a *non-criminal* disciplinary matter constitutes a far broader authority. Contrary to the concurrence, the exercise of such constitutional authority is not comparable to a "lynch mob," does not resemble "mob justice," involves no "prejudgment" of the

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[8] Carroll, *Alice's Adventures in Wonderland*, p 179 (Philadelphia, Pa: H Altemus, 1896).

charges against respondent," does not "disserve the rule of law," and is not otherwise "inappropriate" in any way.

I. "ALLEGATIONS"

The concurrence asserts that my position is "inappropriate" because it fails to recognize that the allegations against respondent are not "established fact" and are "disputed." I am well aware of this, although I am also well aware that this is not a criminal proceeding, see part II, *infra*, and there are considerations that come into play that are distinct, including those pertaining to the integrity of the judicial process, public confidence in the judiciary, and the protection of the public from judicial corruption. At this stage of the disciplinary process, all the Court has before it are allegations. Yet on the basis of allegations alone, each justice must determine how to exercise his or her constitutional authority most responsibly. In my judgment, by exercising our authority to suspend without salary (and to have this held in escrow), it will be made considerably *less* likely that respondent could potentially benefit financially by the diversion of public funds, and it would be made considerably *more* likely that at least some restitution could potentially be made to taxpayers and to those who are the intended beneficiaries of these funds—*if* she is not ultimately vindicated. I do not believe that our Constitution, which grants this Court such broad judicial disciplinary authority, renders us helpless to achieve either of these objectives.

And it is no more to "ignore" that we have only allegations at this point than for a trial court to "ignore" this when it detains a criminal defendant pending trial, places conditions on a defendant's release pending trial, or otherwise takes into consideration prophylactic measures in order to protect the public or to avoid a risk of defendant's flight prior to trial. And in each of those circumstances—unlike in the instant matter—there is a *genuine* criminal proceeding. To read our Constitution as tying the hands of this Court in attempting to *mitigate* the damage of judicial corruption—*if* it is established—has no grounding in our state's Constitution.

A bit of perspective is in order:

—Every member of the majority, as well as myself, supported placing respondent on administrative leave before this matter was ever referred to the JTC, and on the basis of evidence compiled by our own State Court Administrator's Office. Respondent will never be able to recover that lost service.

—Every member of the majority, as well as myself, now supports suspending respondent, and doing so for an indefinite period, *before* the JTC has completed its investigation or issued a final report. Respondent again will never be able to recover that lost service.

The *only* difference between the majority's position and my position is that I would also place respondent's salary in escrow during her suspension, an action specifically contemplated by our Constitution. And in this regard, unlike respondent's loss of service, she *will* eventually be made

whole if she is vindicated, for her salary will be held in escrow. The concurrence is plainly wrong in its assertion that I would "exact [restitution] before a determination of guilt." Rather, there would be no restitution until, and unless, misappropriation charges are established by the JTC and this Court. Pending such a determination, respondent's salary would be held in escrow in order that such funds not be dissipated, and the Constitution is explicit that the Court is authorized to suspend a judge "without salary."

With this bit of perspective, it is clear that whatever the merits of our respective positions, nothing even remotely implicates a failure on my part to appreciate that there are only allegations against respondent, and that these have not yet been established. The single difference I have with the majority has no bearing in any way upon my determination to preserve a fair judicial disciplinary process. I am no less committed to a fair process for respondent than any other justice of this Court, and I am no less mindful than any other justice that there is a difference between allegations and proofs.

With regard to the concurrence's allusions to a "lynch mob" and to "mob justice" in describing my position as to Judge James, there is little that I can productively say concerning such discourse, and so I will hold my tongue. *Res ipsa loquitur*.

II. PURPOSES OF JUDICIAL DISCIPLINE

"Judicial disciplinary proceedings are unique and 'fundamentally distinct' from all other criminal or civil legal proceedings." *In re Ferrara*, 458 Mich 350, 372 (1998). A judicial disciplinary proceeding "lacks the essential characteristics of a criminal prosecution." *In re Mikesell*, 396 Mich 517, 528 (1976) (Citation and quotation marks omitted.). Similarly, a disciplinary order from this Court "does not operate as a sanction for criminal guilt but as a judgment on judicial fitness." *Id*. This Court has repeatedly stated that the object of these proceedings "is not to inflict punishment." *Id*. (citation and quotation marks omitted); see also *In re Jenkins*, 437 Mich 15, 28 (1991); *In re Moore*, 464 Mich 98, 118 (2001); *In re Haley*, 476 Mich 180, 195 (2006). Rather, the purpose is "to determine whether one who exercises judicial power is unfit to hold a judgeship," *Mikesell*, 396 Mich at 528; "to maintain the integrity of the judicial process," *Haley*, 476 Mich at 195; "to restore and maintain the dignity and impartiality of the judiciary," *In re Ferrara*, 472 Mich at 371; and "to protect the people from corruption and abuse on the part of those who wield judicial power." *In re Jenkins*, 437 Mich at 28. "The judicial system is for the benefit of the litigant and the public, not the judiciary." Code of Judicial Conduct, Canon 1.

III. CONSTITUTIONAL AUTHORITY

This Court has ordered interim suspensions without pay in the past, see, e.g., *In re Lawrence*, 417 Mich 1129 (1983), and, in my judgment,

there is no doubt regarding our authority to do so.[1] "Our authority to discipline members of the state judiciary flows from two sources, §§ 30 and 4 of article 6 of the Michigan Constitution." *In re Probert*, 411 Mich 210, 229 (1981). Const 1963, art 6, § 4 embodies a general grant of power, the power of superintending control. It states in relevant part:

> The supreme court shall have general superintending control over all courts. . . . The supreme court shall not have the power to remove a judge.

We elaborated upon the breadth of this power in *In re Huff*, 352 Mich 402, 417-418 (1958):

> "The power of superintending control is an extraordinary power. It is hampered by no specific rules or means for its exercise. It is so general and comprehensive that its complete and full extent and use have practically hitherto not been fully and completely known and exemplified. It is unlimited, being bounded only by the exigencies which call for its exercise. As new instances of these occur, it will be found able to cope with them. Moreover, if required, the tribunals having authority to exercise it will, by virtue of it, possess the power to invent, frame, and formulate new and additional means, writs, and processes whereby it may be exerted." [Quoting 14 Am Jur, Courts § 256.]

The principal limit to the "extraordinary power" of judicial superintendency under our Constitution is that "[t]he supreme court shall not have the power to remove a judge." Const 1963, art 6, § 4. Our case-law makes clear that a suspension—with or without pay—is not tantamount to removal. In *Probert*, 411 Mich at 229 n 11, we looked to definitions of these terms and explained:

> "Suspension" is defined as "[a]n ad interim stoppage or arrest of official power and pay;—not synonymous with 'removal' which terminates wholly the incumbency of the office or employment." [Quoting Black's Law Dictionary (4th rev ed).]

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[1] The concurrence believes that it does "not need to address the question of our underlying authority to suspend a judge without pay prior to the JTC's determination of misconduct," believing it sufficient to address only the "*prudential* reasons why we should not exercise that authority in this case." This strikes me as exactly backwards. One might think that an assessment of our "underlying authority" would be a first step in assessing the disciplinary issue before this Court, and that this would be done *before* assessing any supposed "prudential" limits on that authority. See *infra* at n 3. If, as with the concurrence, I had not resolved the question of our underlying authority, I too would have reached the same conclusion as the concurrence, for this Court can never act without authority.

Accordingly, suspending respondent without salary pending the resolution of her disciplinary proceedings does not impinge on § 4's exclusive limitation. Ordering her salary placed in escrow for the pendency of these proceedings is fully consistent, in my judgment, with this Court's power "to invent, frame, and formulate new and additional means, writs, and processes whereby [our superintending control authority] may be exerted." *In re Huff*, 352 Mich at 418. Indeed, it is precisely this superintending power that has *already* served as the basis for this Court placing respondent on administrative leave earlier this year. Surely, the same broad superintending authority that was exercised by this Court *before* the JTC acted can also be exercised *afterwards*.

The other source of our disciplinary authority, Const 1963, art 6, § 30, prescribes the actions that this Court may undertake in a disciplinary matter. Section 30(2) states in pertinent part:

> On recommendation of the judicial tenure commission, the supreme court may . . . suspend *with or without salary* . . . a judge for . . . misconduct in office . . . or conduct that is clearly prejudicial to the administration of justice. [Emphasis added.]

Section 30(2) grants the Court the authority to suspend "without salary" "on recommendation" of the JTC. While respondent argues that "recommendation" should be given a technical meaning—as referring only to the JTC's final "recommendation"—it seems clear that the petition for interim suspension is equally a "recommendation." That is, the JTC has conducted an initial investigation and determined, in its judgment, that an interim suspension is warranted. However, because the JTC lacks the authority to impose a suspension, it is petitioning this Court, which does possess such authority. It is difficult to understand how this can be characterized as anything other than a "recommendation" by the JTC.[2] Accordingly, this Court has the authority to suspend "with or without salary." Indeed, this authority is confirmed by the majority's own action in suspending the respondent *with* salary, for there is no constitutional distinction between a suspension "with or without salary."

For these reasons, I believe that both §§ 4 and 30(2) of our Constitution provide this Court with the clear authority to order the interim suspension of respondent without salary and to have these funds held in escrow pending the resolution of disciplinary proceedings.[3]

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[2] Although the exercise of this Court's disciplinary authority must be *triggered* by a JTC "recommendation," we have not viewed ourselves as bound by its *specific* recommendation. See, e.g., *In re Hathaway*, 464 Mich 672 (2001). In any event, the JTC is *silent* in this matter as to whether its recommended suspension should be with or without pay.

[3] This conclusion is consistent with our precedents, which make clear that this Court possesses the constitutional authority to suspend a judge

IV. EXERCISE OF CONSTITUTIONAL AUTHORITY

Having determined that this Court possesses the constitutional authority to suspend on an interim basis without pay, the harder question, in my judgment, is whether we should *exercise* this authority in a particular matter. In making this determination, I remain mindful of the nature and the purposes of judicial disciplinary proceedings. See part II, *supra*.

As explained in *Probert*, 411 Mich at 225, in making a determination in a judicial discipline matter, the Court

> must be responsive to individual considerations . . . . [But such] decision . . . must also be responsive to a significant institutional consideration, the preservation of the integrity of the judicial system. [Citation and quotation marks omitted.]

In light of this concern, I believe that it is a proper exercise of our authority in this matter to suspend respondent without salary, and to place her salary in escrow pending final resolution of this matter. I would not take this action to impose "punishment," or as a "sanction for criminal guilt," any more than would the majority, but rather: (a) to protect the "institution," and preserve the "integrity" of the judiciary; and (b) to afford some reasonable prospect for the recovery of public funds for their intended purpose if respondent is not ultimately vindicated of the JTC's allegations.

That is, I would not *continue* to compensate respondent with public funds during an indefinite suspension premised upon—indeed, necessitated by—allegations of past misappropriations of public funds. While respondent may ultimately be vindicated, and while this Court cannot fully undo any damage caused to the judiciary if she is *not* ultimately vindicated, we can at least undertake responsible action within our authority to *mitigate* such damage. By exercising our authority to suspend without salary (and to have this held in escrow), it would be made considerably *less* likely that respondent could potentially benefit financially by the diversion of public funds, and it would be made considerably *more* likely that at least some restitution could potentially be made to taxpayers—*if* she is not ultimately vindicated.[4] I do not believe that our Constitution, which grants this Court broad disciplinary

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without salary. See, e.g., *In re Callanan*, 419 Mich 376 (1984); *In re Lawrence*, 417 Mich 1129 (1983); *In re Szymanski*, 394 Mich 798 (1975). The "prudential limits" to this authority identified by the concurrence has neither been articulated by this Court nor is it compatible with the breadth of our disciplinary authority under Const 1963, § 4. See *Huff*, *supra* at part III.

[4] Whatever "message" to *judges* the concurrence deconstructs from this dissent, the only intended message is to the *public*. And it is that this Court should be prepared to do what is reasonably within our constitu-

authority "to invent, frame, and formulate new and additional means, writs, and processes," renders us helpless to achieve either of these ends.[5]

In coming to these conclusions, I seek to balance the respective harms of our alternative courses of action. On the one hand, withholding respondent's salary until after the charges against her have been fully resolved poses a potential, albeit temporary, harm if she is eventually vindicated because her salary would have been withheld during this time. This is a legitimate concern, and it is why I believe the majority's course of action is not unreasonable. On the other hand, there are the competing harms if respondent is not ultimately vindicated: (a) the diminished likelihood that misappropriated funds will ever be recovered on behalf of the people of Inkster; (b) the diminished likelihood that adequate restitution will ever be afforded the victims of crime for whom such funds were intended; and (c) the potentially diminished public regard for the self-disciplinary processes of this judiciary.

V. "POPULIST APPEAL"

I do not know exactly what the concurrence has in mind when it describes my position as having "strong populist appeal," an odd response to a dissent. I suppose it is to intimate that my position cannot also be legally sound, or that it has been undertaken on the basis of improper considerations. I am confident that a review of my record on this Court will make clear that I have cast no fewer "hard" or "non-populist" votes than other justices, and that I have decided cases on the basis only of what, in my judgment, was required by the law, "strong populist appeal" or not. If on this occasion, there happens to be "strong populist appeal" for my position, then I am pleased, for I believe it is the correct position. This may also be indicative that I have been mindful

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tional authority to ensure that a judge who misappropriates public funds does not benefit from such conduct, and that restitution will be afforded the victims of such misconduct, whether that be taxpayers or the intended beneficiaries of public programs. The concurrence notwithstanding, the judicial disciplinary process is not a "criminal trial" process, but it is intended principally to "protect the people from corruption and abuse on the part of those who wield judicial power." See part II, *supra*.

[5] Although I disagree with the concurrence that this Court could not itself order restitution in a proper case, it is worth noting that precautions to prevent the dissipation of misappropriated public funds also serve the interest of justice in the event that a respondent voluntarily consents to pay restitution or is criminally prosecuted and required to pay restitution. Moreover, it bears repeating that my position "exacts" no restitution, but rather holds respondent's salary in *escrow* in order to make it more likely that some restitution *could* be made *if* she is not ultimately vindicated.

that "the judicial [discipline] system is for the benefit of the litigant and the public, not the judiciary." Code of Judicial Conduct, Canon 1.

VI. CONCLUSION

In conclusion, I believe that the potential harm to the integrity of the judiciary, to the treasury, and to public confidence in the judicial disciplinary process outweighs the undeniable, albeit temporary, harm to respondent. As a result, consistent with our authority under §§ 4 and 30(2) of Article 6 of the Constitution, and in the present circumstances in which allegations of judicial misconduct involve the misappropriation of public funds, I would order respondent's interim suspension without salary, and that her salary be held in escrow until the charges have been resolved.

Summary Disposition December 16, 2011:

MCCUE V O-N MINERALS (MICHIGAN) CO, No. 142287; Court of Appeals No. 294661. Leave to appeal having been granted and the briefs and oral argument of the parties having been considered by the Court, we reverse the November 4, 2010, judgment of the Court of Appeals and we remand this case to the Mackinac Circuit Court for reinstatement of the August 31, 2009, order granting summary disposition to the defendant and denying the plaintiff's motion for partial summary disposition. The plaintiff's claim of negligence failed because the plaintiff did not demonstrate that the defendant, rather than the State of Michigan Department of Transportation, owed the plaintiff and his spouse a duty to maintain or repair the state highway in question. See MCL 691.1402(1). Similarly, the plaintiff failed to state a claim for public nuisance because he did not demonstrate that the defendant acted in a way that unreasonably interfered with a common right enjoyed by the public or that the plaintiff's spouse's injury was different from the type of harm that a member of the general public could have suffered.

CAVANAGH, J. (*dissenting*). I respectfully dissent from this Court's order reversing the Court of Appeals because I believe that the Court of Appeals correctly concluded that defendant is not entitled to summary disposition. Specifically, I believe that genuine issues of material fact remain regarding whether defendant may have had a duty sufficient to support plaintiff's claim of negligence and whether defendant's actions created a public nuisance.

Plaintiff and his wife were participating in the DALMAC bicycle tour when plaintiff's wife fell from her bike and suffered serious injuries while riding over a portion of state highway M-134 in the Upper Peninsula. Plaintiff alleges that the portion of the highway where his wife fell was extensively damaged. Defendant owns the property through which M-134 passes at the location where the fall occurred and conducts mining operations on both sides of the highway. The state holds an easement that allows M-134 to pass over defendant's property. At the point where plaintiff's wife fell, the highway consists of a concrete pad with large steel

rails embedded into the concrete. As permitted by an agreement with the state, defendant routinely crosses M-134 on the concrete pad with its heavy trucks and equipment, including tracked bulldozers. Plaintiff alleges that defendant's repeated, intense use of the highway caused the damage to the highway that resulted in plaintiff's wife's fall.

Even if the majority is correct that defendant had no duty to maintain or repair the state highway in question, I think that defendant arguably had a duty to inform the State of Michigan Department of Transportation (MDOT) of the damage apparently caused by defendant's unusual use of the highway. I believe that this arguable duty arises out of the fact that defendant's use of the portion of the highway where plaintiff's wife was injured is highly intense and fundamentally different from the public's use, and that use potentially either increased the hazard on the public highway that existed at the time of the injury or created a new hazard on the public highway. See *Berman v LaRose*, 16 Mich App 55, 59 (1969). Because defendant's intense use seemingly caused or hastened the damage to the highway and defendant was in the best position to know when repairs were needed, I think that imposing a duty on defendant to inform MDOT of the damage is a fair balancing of the "competing policy considerations" that necessarily go into determining whether a duty exists. *Friedman v Dozorc*, 412 Mich 1, 22 (1981). See, also, *Dyer v Trachtman*, 470 Mich 45, 49 (2004), quoting Prosser & Keeton, Torts (5th ed), § 56, p 374.

Additionally, I agree with the Court of Appeals that genuine issues of material fact exist regarding whether the damage arguably caused by defendant's use of the highway amounted to a public nuisance. This Court has stated that a public nuisance includes an activity that "create[s] an interference in the use of a way of travel." *Garfield Twp v Young*, 348 Mich 337, 342 (1957), citing *Attorney General ex rel Muskegon Booming Co v Evart Booming Co*, 34 Mich 462 (1876). Thus, because defendant's prolonged, intense use of the highway potentially interfered with the use of a state highway by creating or accelerating the damage to the highway, I believe that defendant may have unreasonably interfered with the public's common right to use the state highway.

Finally, with regard to the nature of the injury required to sustain a public nuisance claim, the majority's order inaccurately states that plaintiff cannot pursue a claim because the harm suffered was not "different from the type of harm that a member of the general public *could have suffered*." Emphasis added. However, this Court has stated that a "plaintiff[] must show harm of a kind different from that suffered by other members of the general public exercising the right common to the general public that was the subject of interference." *Adkins v Thomas Solvent Co*, 440 Mich 293, 306 n 11 (1992), citing 4 Restatement Torts, 2d, § 821C. Thus, a court must determine whether the harm suffered by a plaintiff is different from the harm *actually suffered* by the general public, not merely whether a member of the general public "could have suffered" the harm that the plaintiff suffered. I think that plaintiff's spouse's personal injury is sufficient to satisfy this requirement.

As noted, the *Adkins* Court cited the Second Restatement of Torts in discussing this requirement; thus, I believe that the Second Restatement

of Torts should be closely considered. Notably, the Second Restatement explains that where the conduct alleged to be a public nuisance causes "physical harm to [a plaintiff's] land or chattels, the harm is normally different in kind from that suffered by other members of the public and the tort action may be maintained." 4 Restatement Torts, 2d, § 821C, comment d. Moreover, the Restatement provides the following helpful example:

> A digs a trench across the public highway and leaves it unguarded at night without any warning light. B, driving along the highway, drives into the trench and breaks his leg. *B can recover for the public nuisance*. [*Id.* (emphasis added).]

Because the facts and injury suffered in this case are closely analogous to the example provided by the Second Restatement of Torts, I would affirm the Court of Appeals' decision to reverse the trial court's grant of summary disposition in favor of defendant.

Accordingly, I respectfully dissent.

MARILYN KELLY, J. (*dissenting*). I join Justice CAVANAGH's dissenting statement. I write separately to note that I think defendant did have a duty to plaintiff under a negligence theory. Moreover, plaintiff has raised genuine issues of fact sufficient to support this claim.

In defendant's easement agreement with the state, defendant reserved the right to "construct and maintain such . . . roads . . . as may be necessary for the . . . transportation of the ores . . . and . . . the right to go over and across the lands [therein] described."[1] Defendant specifically reserved a right to maintain the section of road where the accident occurred. Thus it voluntarily assumed a duty of care.

Although the general rule is that the exclusive duty to maintain and repair the public highway belongs to the state, in rare cases a private landowner can have this duty. In *Berman v LaRose*, the Court of Appeals stated:

> [T]here is no duty, absent a statute, of an abutting owner as to the condition of the sidewalk or public way, unless the landowner has physically intruded upon the area in some manner or has done some act which either increased the existent hazard or created a new hazard.[2]

Using the *Berman* rule, the Michigan Court of Appeals in *Staskievitz v City of Ann Arbor*,[3] found that a private landowner had a duty to a person injured on the public roadway. In that case, defendant Bagel Factory Inc., shoveled snow into the public roadway resulting in an injury to plaintiff

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[1] The Easement Agreement, Liber 90, pg 598.

[2] 16 Mich App 55, 57 (1969).

[3] Unpublished opinion per curiam of the Court of Appeals, issued April 22, 1997 (Docket No. 191675).

when she fell.[4] The Court of Appeals also found a duty to a private defendant in *Ward v Frank's Nursery & Crafts, Inc*.[5] There, plaintiff was injured after tripping over a pothole in the public alleyway which defendant had covered with loose debris.[6]

There is evidence that defendant in this case physically intruded upon the public road in a way much more extensive than shoveling snow or depositing debris in a pothole. The deterioration it may have caused in the area of roadway in question appeared to have been far in excess of normal wear and tear. The indentions next to the metal rails, which ran perpendicular to traffic, were as deep as two inches. Therefore, defendant had a duty to plaintiff to maintain the roadway where the accident occurred, and there is evidence sufficient for a jury to determine that it breached that duty.

Accordingly, summary reversal of the Court of Appeals' decision is unwarranted, and I respectfully dissent from it.

HATHAWAY, J. (*dissenting*). I agree with Justices CAVANAGH and MARILYN KELLY that reversal of the Court of Appeals' decision is unwarranted. Accordingly, I dissent.

Leave to Appeal Denied December 16, 2011:

NASON v STATE EMPLOYEES' RETIREMENT SYSTEM, No. 142246; reported below: 290 Mich App 416.

Summary Disposition December 21, 2011:

LAMEAU v CITY OF ROYAL OAK, Nos. 141559 and 141560; reported below: 289 Mich App 466. On October 5, 2011, the Court heard oral argument on the application for leave to appeal the July 13, 2010, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Oakland Circuit Court for entry of an order granting summary disposition to the public defendants.

CAVANAGH and HATHAWAY, JJ., would deny leave to appeal.

MARILYN KELLY, J. (*dissenting*). I dissent from the Court's order reversing the judgment of the Court of Appeals and remanding this matter to the trial court for entry of summary disposition in favor of defendants. By rubber-stamping the Court of Appeals dissenting opinion, the majority fails to address the dispositive issues with the thoughtful analysis needed in this case.

The order is the quintessential example of a practice the Court has used more and more of late: a majority resolves a case without writing an

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[4] *Id*.

[5] 186 Mich App 120, 133 (1990), lv den 437 Mich 1033 (1991).

[6] *Id*.

opinion.[1] I oppose extensive use of this practice because it allows the Court to avoid providing comprehensive legal analysis to support its conclusions. It also omits needed guidance to lower courts, litigants, and the public. For reasons that I will detail, the Court of Appeals dissent is an inadequate substitute.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case stems from a fatal accident that occurred on a sidewalk in the city of Royal Oak. Most of the sidewalk was installed in the summer of 2005. It runs alongside a fence adjacent to the city's high school. However, as the attached photographs show, two utility wires were anchored in the walkway. They belonged to Detroit Edison Company and Ameritech. When construction was underway, the city was concerned about the wires and allegedly invited representatives from the utility companies to meet to discuss relocating them. Neither company sent a representative to the meeting. Ameritech later moved its wire. Detroit Edison did not, as shown in the attached photographs.

The city proceeded with its sidewalk construction project despite the presence of Detroit Edison's wire. Bryan Warju, the city's construction project field manager, observed that Detroit Edison had historically provided untimely responses to requests to move its wires and anchors. Gaglio PR Cement Corporation, a contractor on the project, specifically warned Warju of the dangers Detroit Edison's wire posed to people moving along the sidewalk. Gaglio proposed leaving 10 sidewalk pieces unfinished on either side of the wire to discourage traffic near it. But Warju, whose responsibility it was to ensure that the project be timely completed, instructed Gaglio to finish the sidewalk except at the location of the wire and its anchor. That area was covered in asphalt, enclosing the wire's anchor and leaving the wire in place. In an effort to thwart pedestrian traffic, he further instructed Gaglio to barricade the area. Gaglio believed that barricades would not stop the public from using the pathway and told Warju that people would "kick over our barricades and walk through."

Nonetheless, Gaglio allegedly placed several types of barricades around the area, including fencing, barrels, and cones. It also hung "caution" tape and flags from the wire, which was sheathed in a yellow covering. Yet, as Gaglio predicted, passersby repeatedly set aside or removed the barricades. Children were seen playing with the barricades or removing them. Gaglio personnel inspected the site daily to check on the barricades and put them back in place.

On April 24, 2006, a bicyclist fell from his bike at the location of the wire. Royal Oak police informed Detroit Edison of the accident, but still

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[1] See, e.g., *Whitmore v Charlevoix Co Rd Comm*, 490 Mich 964 (2011); *Findley v DaimlerChrysler Corp*, 490 Mich 928 (2011); *Jilek v Stockson*, 490 Mich 961 (2011); *Jones v Detroit Med Ctr*, 490 Mich 960 (2011); *McCue v O-N Minerals*, 490 Mich 946 (2011).

the company failed to move the wire. On May 17, 2006, a second bicycle accident occurred at the site. Again Detroit Edison did nothing, despite the obvious hazard its wire posed.

On the evening of May 24, 2006, John Crnkovich had been partying at a friend's house nearby and had consumed alcohol and marijuana. His blood alcohol content was 0.13 percent. He drove his motorized scooter along the sidewalk. Crnkovich had no protective gear or safety helmet, and his scooter had no light. He crashed into the wire, severed his spinal cord at the C3 and C4 vertebrae, and died.

Plaintiff, Crnkovich's personal representative, brought suit against the city, city engineer Elden Danielson, Warju, Detroit Edison, and Gaglio. Count I of the complaint alleged that Detroit Edison negligently placed the wire and negligently failed to move it. Count II alleged that the city breached its duty to maintain the sidewalk in reasonable repair. Count III alleged that Gaglio breached its duty to perform its contract in a workmanlike manner by building an unsafe sidewalk. Counts IV through IX alleged various nuisance claims. Counts X and XI alleged that Danielson and Warju were grossly negligent in planning and constructing the sidewalk.

The city sought summary disposition on the basis of governmental immunity, arguing that the wire and anchor were part of the telephone pole and thus expressly excluded from the highway exception.[2] Danielson and Warju moved for summary disposition as to their individual liability, arguing that their actions were not grossly negligent and that their conduct was not the proximate cause of Crnkovich's death. The trial court granted the city's motion with respect to plaintiff's nuisance claims, but denied summary disposition of the negligence claim against the city and the individual defendants.

The city, Danielson, and Warju again moved for summary disposition. This time, defendants argued that plaintiff had failed to establish that the sidewalk was the cause of Crnkovich's death. They further argued that it was Crnkovich's reckless behavior that had caused the accident. They added as causes (1) Detroit Edison's failure to respond to the city's requests to move the wire, (2) the removal of the barricades by unknown persons, and (3) Gaglio's failure to ensure that barricades were in place at the time of the accident. Defendants also argued that Crnkovich's wrongful conduct and intoxication barred him from recovering as a matter of law.

Before the trial court ruled on defendants' second motion for summary disposition, the city appealed the trial court's denial of its first motion for summary disposition premised on governmental immunity. The trial court then denied Danielson's and Warju's motions for summary disposition, ruling that questions of fact existed on the issues of gross negligence and proximate cause. The trial court also denied the city's motion for reconsideration. The Court of Appeals consolidated the appeals of the city and of the individual defendants.

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[2] MCL 691.1402.

In a split decision, the Court of Appeals affirmed the trial court's decisions in all respects.[3] It held that the anchor and wire were part of the sidewalk itself, rather than conditions external to the sidewalk. It held that the sidewalk was open to the public given that the barricades were routinely moved out of place. It further held that a reasonable jury could conclude that the individual defendants were grossly negligent given the repeated warnings they had received about the dangers the wire posed. Finally, it held that a genuine issue of material fact existed concerning whether Danielson's and Warju's conduct in creating and failing to rectify the hazard had immediately and directly caused Crnkovich's death. The city and the individual defendants sought leave to appeal in this Court. We granted oral argument on their application.[4]

II. ANALYSIS

The Court's order granting oral argument on defendants' application for leave to appeal specified several issues for the parties to address. Yet its order disposing of the case ignores those issues. The Court of Appeals dissent, on which the majority relies, did not address them either. Moreover, the analysis that the Court of Appeals dissent did undertake is both without factual basis and erroneous as a matter of law.

A. WHETHER THE SIDEWALK WAS OPEN FOR PUBLIC TRAVEL

Perhaps the most elementary of the issues presented in our order granting oral argument on defendants' application for leave to appeal is whether the sidewalk was open for public travel. However, there is a question prefatory to its resolution: whether a sidewalk must be open for public travel to fall within the highway exception to governmental immunity. Although neither the Court of Appeals majority nor dissent addressed this question, I believe its resolution is necessary for a thorough consideration of the issues presented.

MCL 691.1401(e) defines "highway" as "a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway." The city argued that this definition compels the conclusion that the sidewalk in question does not qualify as a highway. This is because the city intended that it not be open to the public during construction. However, for this argument to prevail, the city must establish that the phrase "open for public travel" is applicable to sidewalks as identified in the second clause of MCL 691.1401(e). In my estimation, it is not.

The first step in interpreting a statute is to analyze its language.[5] The provision at issue here, MCL 691.1401(e), lists several specific structures

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[3] *LaMeau v Royal Oak*, 289 Mich App 153 (2010).

[4] *LaMeau v Royal Oak*, 488 Mich 1052 (2011).

[5] *Briggs Tax Serv, LLC v Detroit Pub Sch*, 485 Mich 69, 76 (2010).

in addition to roads and streets: sidewalks, trailways, crosswalks, and culverts on the highway.[6] It does not appear that these structures must be "open for public travel" in order to qualify for inclusion under the highway exception. The most obvious indication that this was the Legislature's intent is that the Legislature included culverts among the structures that fall within the definition of "highway." A "culvert" is "a drain or channel crossing under a road, sidewalk, etc. . . ."[7]

Under any commonsense interpretation, culverts are not "open for public travel." It follows that the other structures identified in the second clause of the statute are also not modified by the language "open to public travel" from the first clause. Rather, it is only the structures in the first clause—public highways, roads, or streets—that must be open for public travel in order to fall within the highway exception. Hence, defendants are not entitled to summary disposition even if there were adequate barricades in place at the time of the accident.

If a sidewalk must be open to public travel to fall within the highway exception to governmental immunity, there is strong evidence that the sidewalk here was open to public travel. The city seizes on the fact that, at one time, barricades of varying kinds were in place around the sidewalk. Those barricades allegedly included fencing, cones, flags, and safety barrels. But the essential fact, one that the city cannot dispute, is that the barricades were gone and the sidewalk *was* open to the public on the night of Crnkovich's death. The attached photographs taken by police on the night of the accident show a barrier-free sidewalk. Furthermore, it is undisputed that at least two other bicyclists had been injured earlier at the same location. Because pedestrians, bicyclists, and other sidewalk users could traverse the area in question, it appears that the sidewalk was open to public travel.

The Court of Appeals dissent did not opine on this issue, and this Court's majority relies solely on that dissent. Hence, it appears that the majority agrees with my position that sidewalks need not be open to public travel to fall within the highway exception. Alternatively, the majority concedes that the sidewalk in this case was open to public travel.

B. WHETHER THE WIRE CONSTITUTED A "DEFECT" IN THE SIDEWALK

The Court of Appeals dissent concluded that "[t]he relevant statutory language [in MCL 691.1401(e)] specifically excludes utility poles, and it is disingenuous to suggest that any appendage extending from a utility pole

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[6] In its entirety, MCL 691.1401(e) provides: " 'Highway' means a public highway, road, or street that is open for public travel and includes bridges, sidewalks, trailways, crosswalks, and culverts on the highway. The term highway does not include alleys, trees, and utility poles."

[7] *Random House Webster's College Dictionary* (2001).

should be treated as a separate or distinguishable entity."[8] Thus, it concluded that the wire did not constitute a defect within the meaning of MCL 691.1402a.[9]

The relevant statutory definition of "highway" in MCL 691.1401(e) and the language of MCL 691.1402a specifically *include* the maintenance and repair of sidewalks within the scope of municipalities' duties. Thus, to borrow from the Court of Appeals dissent's approach, it is disingenuous to suggest that any appendage extending from *the sidewalk* should be treated as a separate or distinguishable entity.

The attached photographs show that the wire was made part and parcel of the sidewalk when its anchor was embedded therein. At a minimum, the wire was at least equal parts sidewalk and utility pole because it was physically connected at either end to both structures. Alternatively, the wire could be considered part of the utility pole. But if that were the case, the Legislature could not have intended to include within the scope of governmental immunity a utility pole or its appendages embedded in the sidewalk itself.

Thus, the city, having a duty to maintain the sidewalk and keep it in reasonable repair, arguably breached its duty by leaving the wire embedded in the sidewalk. Whether in this case the city satisfied its duty under MCL 691.1402(1) is a question for the trier of fact—one that should not be resolved by summary disposition. The majority's adoption of the analysis and conclusion of the Court of Appeals dissent is misplaced.[10]

C. WHETHER THE INDIVIDUAL DEFENDANTS WERE GROSSLY NEGLIGENT IS A QUESTION OF FACT

The third dispositive question presented in this case is whether the conduct of the individual defendants can be considered grossly negligent, in which case those defendants are not entitled to governmental immunity. The Court of Appeals dissent summarily concluded that, in addition to the city, the individual defendants are entitled to summary disposition. However, the question of whether those defendants were grossly negligent is a question of fact for the jury.

MCL 691.1407(2) provides that governmental employees are generally immune from tort liability unless the employees' conduct amounted

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[8] *LaMeau*, 289 Mich App at 188 (TALBOT, P.J., dissenting).

[9] Municipalities have a duty to repair and maintain sidewalks under MCL 691.1402(1). However, under MCL 691.1402a(1)(a) and (b), the municipality must have been aware of the defect at least 30 days before the injury and the defect must have proximately caused the injury for liability to arise.

[10] The Court of Appeals dissent also relied heavily on *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143 (2000), and *Buckner Estate v City of Lansing*, 480 Mich 1243 (2008), to support its conclusions. For the reasons stated in my dissenting opinions in those cases, I continue to believe those cases were wrongly decided.

to gross negligence that was the proximate cause of an injury. MCL 691.1407(7)(a) defines "gross negligence" as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results."

Viewing the facts in a light most favorable to the nonmoving party,[11] it is apparent that the majority has usurped the function of the jury and assumed the role of the finder of fact. Because the Court of Appeals majority thoroughly and thoughtfully analyzed whether the individual defendants' conduct could be considered grossly negligent by a reasonable jury, I adopt its analysis:

> On appeal, Danielson and Warju frame the issue in terms of their conduct after the construction of the sidewalk at issue. That is, they argue that the evidence concerning the steps that they took to barricade the sidewalk and to get Detroit Edison to move the anchor and guy wire did not show that their conduct rose to the level of gross negligence; instead, they contend that "[i]f such a minor level of negligence is sufficient to avoid immunity, immunity for individuals based upon gross negligence would be undermined, if not abrogated." However, the proper focus is not solely on the evidence concerning the steps they took *after* creating the defect in the sidewalk. Rather, the totality of their conduct—including their actions leading to the creation of the defect in the sidewalk as well as the steps they took to remediate the defect—must be evaluated when determining whether their actions could be found to amount to gross negligence. Indeed, if the defect had not been created in the first instance, then there would have been no need to remediate it.
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> Although the sidewalk project called for the placement of the sidewalk through the area occupied by the anchor and guy wire, the decision to place the sidewalk along this path was not inherently negligent—let alone grossly negligent—given that the anchor and guy wire could have been relocated. Indeed, there was evidence that another utility was able to timely move its own anchor and guy wire. However, once Gaglio Cement began to prepare the area and pour concrete flags, both Rosalino and Salvatore Gaglio noticed that the anchor and guy wire had not been relocated and informed Warju of the need to move it. Nevertheless, Warju ordered them to proceed with the project and told them to just block the area off. Rosalino disagreed with this course and urged Warju to leave a substantial distance—50 feet in either direction—unpaved for safety purposes. Despite Rosalino's protestation that people would get hurt, Warju told them to pave right up to the anchor and guy wire and leave just one flag unpaved.
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> Sometime later, Warju asked Salvatore to fill the missing flag with asphalt. Salvatore again warned Warju against paving the

[11] See *Dressel v Ameribank*, 468 Mich 557, 561 (2003) (holding that, when reviewing motions for summary disposition, we consider the facts in a light most favorable to the nonmoving party).

area before the guy wire was relocated, but Warju said, "[J]ust put it there, and then next year when you guys come back, you guys can fill it in with the concrete." Salvatore said that he also warned Warju that if they put asphalt in there, people were just going to "kick over our barricades and walk through." He said that Warju told him not to "worry about it, we'll just keep an eye on it."

When asked whether Warju could have halted the project to await the relocation of the anchor, Danielson admitted that he could have done so, but explained that there was no policy requiring that. Instead, he said the proper procedure is to complete the project and barricade the hazard area. Similarly, when asked to explain why he did not leave the area unpaved, Warju explained: "Well, we are on a schedule to do the sidewalk. We are coming down that street. We are not going to stop and wait for nine months in this case for Detroit Edison to relocate their wire along with other objects which are in the way."

The testimony concerning the events leading up to the creation of the hazard strongly suggested that Danielson and Warju were indifferent to the magnitude of the danger being created. The anchor and guy wire posed a clear danger even to pedestrians traversing the paved portion of the sidewalk. Yet the danger increased dramatically for persons moving at any speed greater than a walk—the location of the fence on one side and of wires and poles on the other made it difficult for any person moving at such a speed to avoid the hazard, and the height of the guy wire rendered anyone who failed to avoid it in danger of sustaining a head or neck injury. Given this evidence, Danielson and Warju should have realized the seriousness of the hazard they were creating by ordering that the sidewalk be paved before moving the anchor and guy wire. On the basis of this evidence, a reasonable jury could conclude that the decision to incorporate the anchor and guy wire into the sidewalk demonstrated "a substantial lack of concern for whether an injury results." MCL 691.1407(7)(a); *Maiden* [*v Rozwood*, 461 Mich 109, 122-123 (1999)] (stating that, in order to survive a motion for summary disposition premised on governmental immunity for governmental employees, a plaintiff must adduce proof of conduct so reckless that it demonstrates a substantial lack of concern for whether an injury will result). Even if Danielson and Warju did not fully appreciate the danger, the evidence also showed that they were repeatedly warned about the danger posed by paving up to the anchor and guy wire, yet ordered Gaglio Cement to proceed anyway.

Further, although there was evidence that Danielson and Warju contacted Detroit Edison about moving the anchor and guy wire, the evidence also suggested that Danielson's and Warju's efforts in this regard were deficient. Neither Danielson nor Warju ever formally requested Detroit Edison to relocate the anchor and guy wire. Warju did send a letter to Detroit Edison advising it of a meeting concerning the project, and in the letter he noted that any conflicts with utilities would be discussed at the meeting, but he

presumed that because the development of Stevens-Johnson Syndrome is a known risk of prescribing tegretol, proximate causation is per se established. After presuming that plaintiff could prove negligence, the lower court "collapse[d]" factual and proximate causation such that the two were "essentially indistinguishable," *Jones v Detroit Medical Ctr*, 288 Mich App 466, 481 (2010), contrary to traditional standards for determining proximate causation. For a plaintiff to prevail on proximate cause at the summary disposition stage, it must be shown that reasonable minds cannot differ that injury was a foreseeable, natural, and probable consequence of the defendant's negligence. Here, viewing the evidence in the light most favorable to defendants, there is a question of fact in this regard that should be submitted to the trier of fact rather than decided as a matter of law.

HATHAWAY, J. (*dissenting*). I believe that leave to appeal was improvidently granted because the result reached by the Court of Appeals in this case was correct.

CAVANAGH and MARILYN KELLY, JJ., joined the statement of HATHAWAY, J.

JILEK v STOCKSON, No. 141727; reported below: 289 Mich App 291. On October 5, 2011, the Court heard oral arguments on the application for leave to appeal the July 29, 2010, judgment of the Court of Appeals. On order of the Court, the application is again considered and, pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The trial court correctly determined as a matter of law that the appropriate standard of care was "family practice" because the defendant physician is board-certified solely in family medicine. Further, pursuant to MCL 600.2912a, the trial court properly allowed the jury to consider that standard of care in light of the facilities available to the defendant physician—an urgent care center, not an emergency medical facility. The trial court did not abuse its discretion in ruling that defendants' two experts were qualified to provide "standard of care" testimony under MCL 600.2169 because they satisfied the specific qualifications of MCL 600.2169(1)(a) and (b). We also conclude that the trial court did not abuse its discretion in excluding plaintiff's proposed document exhibits at issue for the reasons stated in the analysis of the Court of Appeals dissenting opinion.

Contrary to the dissent's assertion, the trial court's error in waiting to establish the standard of care until after the proofs had closed is not "inconsistent with substantial justice." MCR 2.613(A). Dr. Richard Birrer, one of plaintiff's experts, testified that there is not a difference between family practice medicine and emergency medicine. Thus, under plaintiff's theory of the case, additional and perhaps distinct testimony on the standard of care for doctors specializing in family medicine was unnecessary. Furthermore, plaintiff significantly contributed to the trial court's error by arguing that the trial court should have used *Woodard v Custer*'s "one-most-relevant-specialty" test to determine that Dr. Stockson was practicing emergency medicine, and thus that she should have been held to the standard of care of an emergency medicine specialist. *Woodard v Custer*, 476 Mich 545, 566 (2006). Plaintiff's argument ultimately persuaded the trial court to correctly conclude that Dr. Stockson was a "specialist," just not in the incorrect "specialty" plaintiff

desired. Plaintiff should not be rewarded with a retrial simply because her faulty argument only half side-tracked the trial court. Moreover, the trial court did not preclude plaintiff from presenting standard-of-care testimony from a doctor specializing in family medicine. Thus, while the trial court did not manage the standard of care or the expert qualification issues perfectly, its error did not prejudice plaintiff so as to make upholding the jury verdict "inconsistent with substantial justice" under MCR 2.613(A). We remand this case to the Court of Appeals for consideration of issues raised by the plaintiff but not addressed by that court during its initial review of this case.

CAVANAGH, J. (*dissenting*). I respectfully dissent because, in my view, the majority misses the point of this case. By reversing the Court of Appeals' grant of a new trial, the majority ignores that the trial court waited until the close of proofs to determine the appropriate standard of care. The trial court's error essentially nullified much of the expert testimony already heard by the jury, disqualified at least one expert who had already testified, and emphasized the testimony of defendants' experts over those of plaintiff. In my opinion, this error rendered the trial so fundamentally deficient that a refusal to grant a new trial is "inconsistent with substantial justice." MCR 2.613(A). I therefore respectfully dissent from the majority's implicit affirmance of the trial court's erroneous procedure.

Because only qualified experts may testify, and because this Court has held that MCL 600.2169(1) requires that testifying experts must match the "one most relevant standard of practice or care," it follows that the standard of care must be determined before trial in order to qualify the experts.[1] *Woodard v Custer*, 476 Mich 545, 558-566 (2006). Rather than determining the proper standard of care and allowing defendant and plaintiff to prepare accordingly, the trial court permitted each side to present dueling standards of care to the jury. Only at the close of proofs, when it came time to formulate the jury instructions, did the trial court finally rule on the applicable standard of care. In discussing the instructions with the attorneys, the trial court continued to maintain it was appropriate to allow emergency room physicians to testify as to the standard of care. The trial court then instructed the jury that the applicable standard of care was that of "a physician specializing in family practice and working in an urgent care center . . . ."[2]

In my view, the trial court seriously erred and deprived plaintiff of a fair trial. First, there is no board certification available for family practice

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[1] While I continue to believe that MCL 600.2169 is an unconstitutional violation of the separation of powers doctrine, I also believe that as long as it remains the law in Michigan, the bench and bar deserve guidance as to its proper and evenhanded application. See *Woodard v Custer*, 476 Mich 545, 579-580 (2006) (CAVANAGH, J., concurring); *McDougall v Schanz*, 461 Mich 15, 38 (1999) (CAVANAGH, J., dissenting).

[2] The majority's order states that the trial court did not err by determining that "family practice" was the appropriate standard of care, but that statement is erroneous because the trial court did not limit its

in an urgent-care center, and thus the trial court's hybrid standard of care violates *Woodard*, 476 Mich at 561, in which this Court stated, "[A] 'specialty' is a particular branch of medicine or surgery in which one can potentially become board certified." Second, if the applicable standard of care was indeed family medicine, then the trial court should not have allowed an emergency physician to testify as to the standard of care under MCL 600.2169(1). Had the trial court conclusively ruled on the applicable standard of care before trial, plaintiff would have had at least some opportunity to secure another expert and focus the testimony solely on family medicine.[3]

Third, the trial court's instruction rendered irrelevant much of the testimony of plaintiff's experts. The trial court's instruction effectively disqualified Dr. Michael Sama—after he had already testified—and rendered suspect much of the testimony of Dr. Richard Birrer, who had testified regarding the standard of care for both emergency and family-medicine physicians. In my view, the trial court essentially instructed the jury that it should rely on defendants' experts, both of whom testified solely as to the standard of care for family-medicine physicians. All of these problems could have been avoided by simply determining the applicable standard of care before the beginning of trial. In my view, the trial court's error rendered the trial not just imperfect, but fundamentally flawed in favor of defendants on the critical issue, and a new trial is the only remedy that is consistent with "substantial justice" under MCR 2.613(A).

Therefore, I would affirm the result of the Court of Appeals and remand for a new trial. I would, however, vacate the Court of Appeals' conclusion that emergency medicine is the applicable standard of care and require only that the governing standard of care be determined before trial in order to afford all parties a reasonable opportunity to prepare accordingly and assure that the jury is not confused by poten-

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description of the standard of care to "family practice," but to that of "a physician specializing in family practice and working in an urgent care center . . . ."

[3] Plaintiff asserted from the beginning that emergency medicine was the appropriate standard of care. Defendants failed to respond to interrogatories and avoided stating a definitive position on the standard of care until one month before trial, when nonappellant defendant Trinity Health-Michigan moved to exclude plaintiff's emergency-medicine expert from testifying, arguing that family medicine was the applicable standard of care. The trial court denied Trinity-Health's motion, stating that it agreed with plaintiff that Dr. Michael Sama was properly qualified. In the context of MCL 600.2169, the only reasonable inference was that, if Dr. Sama was qualified to testify, then emergency medicine must be the one most relevant standard of care. Thus, the actions of the trial court led plaintiff to believe her experts were qualified to testify.

tially erroneous, irrelevant, and misleading evidence.[4] Finally, I would affirm the Court of Appeals with respect to the admissibility of guidelines and internal policies, for the reasons stated in part II of the Court of Appeals' opinion.

MARILYN KELLY, J., joined the statement of CAVANAGH, J.

HATHAWAY, J., would deny leave to appeal.

WHITMORE v CHARLEVOIX COUNTY ROAD COMMISSION, No. 142106; Court of Appeals No. 289672. On December 7, 2011, the Court heard oral argument on the application for leave to appeal the October 7, 2010, judgment of the Court of Appeals. On order of the Court, the application is again considered. MCR 7.302(H)(1). In lieu of granting leave to appeal we affirm the judgment of the Court of Appeals in part.

The Court of Appeals did not err in affirming the trial court's denial of defendant's motion for summary disposition, MCR 2.116(C)(7). In reviewing a motion for summary disposition brought under MCR 2.116(C)(7), a court must accept "[t]he contents of the complaint . . . as true unless contradicted by documentation submitted by the movant." *Maiden v Rozwood*, 461 Mich 109, 119 (1999), citing *Patterson v Kleiman*, 447 Mich 429, 434 n 6 (1994). While "a movant under MCR 2.116(C)(7) is not required to file supportive material, and the opposing party need not reply with supportive material," a party "may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence," as long as "the substance or content of the supporting proofs [is] admissible in evidence." *Id.*

MCL 691.1403 requires a governmental agency to have either actual or constructive knowledge of the "particular condition [that] posed an unreasonable threat to safe public travel . . . ." *Wilson v Alpena Co Rd Comm*, 474 Mich 161, 169 (2006). Constructive notice is conclusively established when "the defect has been readily apparent to an ordinarily observant person for 30 days or longer before the injury." MCL 691.1403. Plaintiffs pled that the alleged defect causing their injuries existed for 30 days or longer before the injuries. Accordingly, defendant is not entitled to summary disposition on this basis.

We clarify that plaintiffs did not properly plead *actual* knowledge of the *particular* defect that caused their injuries because they only allege that defendant knew of general problems with the highway that required frequent patching and that defendant scheduled reconstruction of the

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[4] I am not so concerned about whether the correct standard of care in this case is emergency medicine or family medicine. As I have noted in the past, "the lines between various medical specialties are often not the most well-defined," *McDougall*, 461 Mich at 67 (CAVANAGH, J., dissenting), and indeed, the problems in this case center on whether urgent-care medicine is emergency medicine or family medicine. I am far more concerned in this case that the applicable standard of care governing the trial be determined before trial to assure that *both sides* are given a chance to fairly present their evidence without running the risk of having the proverbial rug pulled out from under them at the end of trial.

highway. *Wilson*, 474 Mich at 169. The Court of Appeals erred to the extent that its rationale is inconsistent with *Wilson*.

The Court of Appeals correctly determined that defendant is not entitled to summary disposition for failure to comply with MCL 691.1404(1). MCL 691.1404(1) requires an injured person to serve, within 120 days, notice on the governmental agency that "specif[ies] the exact location and nature of the defect." Defendant is not entitled to summary disposition under MCR 2.116(C)(7) because it did not challenge below plaintiffs' assertion that they accompanied their § 1404(1) notice with a police report that specified additional details required by § 1404(1).

We reverse in part the judgment of the Court of Appeals regarding defendant's motion to strike portions of plaintiffs' allegations relating to defendant's alleged failure to warn, for the reasons stated in Judge BANDSTRA's partial dissent. Plaintiffs' only theory of recovery is based on defendant's duty to maintain the highway "in reasonable repair so that it is reasonably safe and convenient for public travel," pursuant to MCL 691.1402. Plaintiffs' alleged failure to warn claims are barred under § 1402 pursuant to this Court's decision in *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143 (2000), as Judge BANDSTRA's partial dissent properly recognized.

We remand this case to the Charlevoix Circuit Court for further proceedings consistent with this order. We do not retain jurisdiction.

CAVANAGH, MARILYN KELLY, and HATHAWAY, JJ., would deny leave to appeal.

PEOPLE v DANTE MOORE, No. 143725; Court of Appeals No. 281046. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the judgment of the Court of Appeals, for the reasons stated in the Court of Appeals dissenting opinion, and we remand this case to the Macomb Circuit Court for resentencing. In all other respects, leave to appeal is denied.

Leave to Appeal Granted December 21, 2011:

PEOPLE v NUNLEY, No. 144036; reported below: 294 Mich App 274. The parties shall address whether the Court of Appeals erred when it held that the Department of State certificate of mailing is testimonial in nature and thus that its admission, without accompanying witness testimony, would violate the Confrontation Clause. See *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *Melendez-Diaz v Massachusetts*, 557 US 305; 129 S Ct 2527; 174 L Ed 2d 314 (2009); and *Bullcoming v New Mexico*, 564 US __; 131 S Ct 2705; 180 L Ed 2d 610 (2011).

The Criminal Defense Attorneys of Michigan and the Prosecuting Attorneys Association of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 21, 2011:

DAVIS v EMERGENCY MANAGER FOR THE DETROIT PUBLIC SCHOOLS, No. 144084; Court of Appeals No. 306165. At oral argument, the parties shall address whether the office of Emergency Manager for the Detroit Public Schools should be declared vacant because Roy Roberts did not take the oath of office before entering upon his duties, but subsequently took the oath of office before this quo warranto action was filed. The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Statements Regarding Decisions on Motion for Disqualification Entered December 21, 2011:

PARISE v DETROIT ENTERTAINMENT LLC, No. 144072; reported below: 295 Mich App 25.

YOUNG, C.J. I deny plaintiff's motion seeking my disqualification. Plaintiff's only basis for seeking my disqualification is an alleged donation of $1,000 made more than 11 years ago by the daughter of defendant's owner to the Michigan Republican Party and an alleged subsequent loan by the Michigan Republican Party to my Supreme Court campaign in 2000. Even if true, these allegations are insufficient to give rise to an appearance of impropriety. Plaintiff does not claim that I am actually biased for or against either party in this matter. Because I am not biased for or against either party in this matter, I deny plaintiff's motion seeking my disqualification.

MARKMAN, J. I deny plaintiff's motion seeking my disqualification. Plaintiff's basis for seeking my disqualification is an unlawful donation of $1000 made by a relative of defendant casino's owner to a political committee, which later provided a loan to my judicial campaign in 2000. Had this $1000 donation been made directly to my campaign, it would have been within the limits established by Michigan law, and "[s]uch limits must be understood as clearly reflecting the Legislature's, and the people's, understanding that contributions in these amounts will not supply a basis for disqualification." *Adair v Michigan*, 474 Mich 1027, 1042 (2006). Each justice of this Court has received campaign loans or contributions from political committees, and it is unreasonable to expect that a recipient of such a loan or contribution is in a position to monitor the hundreds or even thousands of individual contributors to such committees. Moreover, because I am not actually biased for or against either party in this matter, I deny plaintiff's motion seeking my disqualification.

Summary Disposition December 28, 2011:

PEOPLE v RICHARD SPANGLER, No. 143418; Court of Appeals No. 299953. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Oakland Circuit Court and direct that court to comply with the Court of Appeals' order to determine "whether defendant's

PSIR* has been amended to reflect the amendments ordered by the court in its April 6, 1994 order. If the PSIR has not been amended in accordance with that order, the court is ordered to do so. The court must forward the amended PSIR to the department of corrections. MCL 771.14(6), (9)." Correspondence from the department of corrections and the Oakland Circuit Court in response to the May 23, 2011, order of the Court of Appeals clearly indicates that those parties misinterpreted that order. The trial court's April 6, 1994, order did not address the issue whether the victim was erroneously reported to be a minor. Rather, it referred to other errors that appeared in the PSIR. Thus, the trial court has not yet undertaken the actions called for in the May 23, 2011, order of the Court of Appeals. In all other respects, leave to appeal is denied. The motion for order to show cause is denied. We do not retain jurisdiction.

HAYWOOD v SCHUMAKER, No. 143534; Court of Appeals No. 300177. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for reconsideration in light of *Driver v Naini*, 490 Mich 239 (2011).

CAVANAGH, J., would deny leave to appeal.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v STECKER, No. 143943; Court of Appeals No. 305519. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

Leave to Appeal Denied December 28, 2011:

PEOPLE v RANDY CURRY, No. 142703; Court of Appeals No. 300033.

PEOPLE v EDDIE LEWIS, No. 142739; Court of Appeals No. 301134.

PEOPLE v BRYANT, No. 142933; Court of Appeals No. 299462.

PEOPLE v SHERMAN, No. 142967; Court of Appeals No. 302106.

PEOPLE v GROSS, No. 142984; Court of Appeals No. 301897.

PEOPLE v VOL PARKER, No. 143020; Court of Appeals No. 302022.

PEOPLE v BUCHANAN, No. 143023; Court of Appeals No. 302433.

PEOPLE v BRIGGS, No. 143030; Court of Appeals No. 301785.

PEOPLE v MATTHEW PRITCHETT, No. 143031; Court of Appeals No. 301755.

PEOPLE v RAGAN, No. 143057; Court of Appeals No. 302527.

PEOPLE v WARNER, No. 143084; Court of Appeals No. 301747.

PEOPLE v EARNEST JOHNSON, No. 143092; Court of Appeals No. 298953.

PEOPLE v QUATRINE, No. 143114; Court of Appeals No. 301363.

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* Presentence investigation report—REPORTER.

PEOPLE v BASIL PERRY, No. 143128; Court of Appeals No. 298966.

PEOPLE v REASTER, No. 143142; Court of Appeals No. 302229.

PEOPLE v WILL MORRIS, No. 143148; Court of Appeals No. 296490.

PEOPLE v MARTINEZ, No. 143156; Court of Appeals No. 301876.

PEOPLE v RASHAD MOORE, No. 143166; Court of Appeals No. 299207.

PEOPLE v MORGAN, No. 143175; Court of Appeals No. 300134.

PEOPLE v CARRUTHERS, No. 143181; Court of Appeals No. 302999.

PEOPLE v BATES, No. 143209; Court of Appeals No. 302845.

PEOPLE v JONATHON CLARK, No. 143218; Court of Appeals No. 303026.

PEOPLE v BRIAN WILLIAMS, No. 143219; Court of Appeals No. 302598.

PEOPLE v HENSLEY, No. 143227; Court of Appeals No. 302910.

PEOPLE v THEODORE WILLIAMS, No. 143228; Court of Appeals No. 299218.

PEOPLE v LARRY SILSBY, No. 143230; Court of Appeals No. 299828.

PEOPLE v ANTONIO HUNTER, No. 143239; Court of Appeals No. 302434.

PEOPLE CHAMBERS, No. 143240; Court of Appeals No. 301920.

PEOPLE v PEETE, No. 143266; Court of Appeals No. 299863.

PEOPLE v VELEZ, No. 143268; Court of Appeals No. 303131.

PEOPLE v PAGE, No. 143269; Court of Appeals No. 300683.

PEOPLE v WAGNER, No. 143272; Court of Appeals No. 299095.

In re MARVIN L CLARK TRUST, No. 143277; Court of Appeals No. 296041.

PEOPLE v SAMUEL BRIDGES, No. 143284; Court of Appeals No. 299575.

PEOPLE v COREY JACKSON, No. 143285; Court of Appeals No. 299857.

PEOPLE v SCHULTZ, No. 143294; Court of Appeals No. 301518.

PEOPLE v DEAN CLARK, No. 143296; Court of Appeals No. 299765.

PEOPLE v GILBERT, No. 143313; Court of Appeals No. 302481.

PEOPLE v CODDINGTON, No. 143314; Court of Appeals No. 300295.

PEOPLE v LOVELACE, No. 143315; Court of Appeals No. 299010.

PEOPLE v THOMPSON, No. 143326; Court of Appeals No. 302653.

PEOPLE v MALLOY, No. 143327; Court of Appeals No. 299693.

PEOPLE v STANLEY DANIELS, No. 143357; Court of Appeals No. 299186.

PEOPLE v BENTLEY, No. 143358; Court of Appeals No. 300012.

PEOPLE v ANTONIO COOK, No. 143362; Court of Appeals No. 300139.

PEOPLE v PRINE, No. 143363; Court of Appeals No. 302773.

PEOPLE v APOLLO JOHNSON, No. 143375; Court of Appeals No. 296706.

PEOPLE v HALSTEAD, No. 143378; Court of Appeals No. 299974.

PEOPLE v SEYMOUR, No. 143383; Court of Appeals No. 303101.

PEOPLE v CONEY, No. 143384; Court of Appeals No. 303991.

PEOPLE v PATTERSON, Nos. 143391 and 143392; Court of Appeals Nos. 290857 and 299354.

PEOPLE v PAYNE, No. 143393; Court of Appeals No. 302708.

PEOPLE v PFEIFFER, No. 143394; Court of Appeals No. 299001.

PEOPLE v JAMES LITTLETON, No. 143395; Court of Appeals No. 296411.

PEOPLE v HUNT, No. 143399; Court of Appeals No. 303177.

PEOPLE v MORAN-DOPICO, No. 143400; Court of Appeals No. 300376.

PEOPLE v YATES, No. 143412; Court of Appeals No. 302329.

PEOPLE v BOWERS, No. 143413; Court of Appeals No. 303741.

PEOPLE v BARNES, No. 143428; Court of Appeals No. 303412.

FIFTH THIRD BANK v CANVASSER, No. 143431; Court of Appeals No. 296731.

PEOPLE v KEITH, No. 143434; Court of Appeals No. 302918.

PEOPLE v RONALD MCLEAN, No. 143451; Court of Appeals No. 303262.

PEOPLE v BROCKMAN, No. 143457; Court of Appeals No. 300485.

PEOPLE v BULLOCK, No. 143463; Court of Appeals No. 304034.

PEOPLE v BOMAR, No. 143473; Court of Appeals No. 300568.

PEOPLE v STEVEN LONG, No. 143479; Court of Appeals No. 300197.

PEOPLE v GREGORY HAMILTON, No. 143481; Court of Appeals No. 300075.

PEOPLE v WALLER, No. 143484; Court of Appeals No. 297639.
CAVANAGH, J., would grant leave to appeal.

PEOPLE v HUGHES, No. 143488; Court of Appeals No. 304010.

PEOPLE v ROBBINS, No. 143494; Court of Appeals No. 298026.

PEOPLE v PALMATEER, No. 143496; Court of Appeals No. 300498.

SELF REALIZATION MEDITATION HEALING CENTRE v BATH TOWNSHIP, No. 143498; Court of Appeals No. 297475.

PEOPLE v PEREZ-CHICA, No. 143514; Court of Appeals No. 300563.

FARAH v BANK OF AMERICA, NA, No. 143517; Court of Appeals No. 297261.

PEOPLE v DAVIDSON, No. 143519; Court of Appeals No. 304177.

PEOPLE SHEPHERD, No. 143520; Court of Appeals No. 300150.

PEOPLE v HARDWAY, No. 143523; Court of Appeals No. 303875.

PEOPLE v RAAR, No. 143524; Court of Appeals No. 299888.

ENSZER v CIVIL SERVICE COMMISSION, No. 143525; Court of Appeals No. 295439.

PEOPLE v KEITH WALKER, No. 143526; Court of Appeals No. 303515.

PEOPLE v LARRY COOLEY, No. 143528; Court of Appeals No. 303549.

BRITTON v STATE EMPLOYEES' RETIREMENT SYSTEM, No. 143532; Court of Appeals No. 297274.

PEOPLE v HOFFMAN, No. 143539; Court of Appeals No. 302254.

PEOPLE v DOLBY, No. 143555; Court of Appeals No. 302235.

HOLLENBECK v FARM BUREAU MUTUAL INSURANCE COMPANY, No. 143559; Court of Appeals No. 297900.
HATHAWAY, J., would grant leave to appeal.

LAGACE v BAY REGIONAL MEDICAL CENTER, No. 143564; Court of Appeals No. 294946.
HATHAWAY, J., would grant leave to appeal.

PEOPLE v STEWART, No. 143566; Court of Appeals No. 299265.

PEOPLE v MURDAY, No. 143576; Court of Appeals No. 304395.

PEOPLE v JAMES WEBB, No. 143578; Court of Appeals No. 303186.

PEOPLE v DARRYL BROWN, No. 143580; Court of Appeals No. 296133.

PEOPLE v MACUGA, No. 143581; Court of Appeals No. 296893.

PEOPLE v ADAM ANDERSON, No. 143582; Court of Appeals No. 298298.

PEOPLE v HNANICEK, No. 143584; Court of Appeals No. 303693.

STAIR v 13TH CIRCUIT COURT CLERK, No. 143588; Court of Appeals No. 302119.

PEOPLE v MALONE, No. 143595; Court of Appeals No. 298061.

PEOPLE v HANA, No. 143605; Court of Appeals No. 304108.

PEOPLE v SHEFFIELD, No. 143607; Court of Appeals No. 296780.

PEOPLE v DYLAN TRAVIS, No. 143610; Court of Appeals No. 304288.

PEOPLE v FRAZIER, No. 143612; Court of Appeals No. 297627.

PEOPLE v BANKS, No. 143614; Court of Appeals No. 298168.

PEOPLE v DARREN JOHNSON, No. 143615; Court of Appeals No. 296722.

PEOPLE v KEITH ROGERS, No. 143623; Court of Appeals No. 300401.

PEOPLE v JOHNNY ADAMS, No. 143631; Court of Appeals No. 302210.

In re MILDRED WENDT REVOCABLE TRUST, No. 143635; Court of Appeals No. 298391.

PEOPLE v ADAM ADAMS, No. 143642; Court of Appeals No. 286641.

PEOPLE v LARRY ROBINSON, No. 143643; Court of Appeals No. 304412.

PEOPLE v THOMAS YOUNG, No. 143644; Court of Appeals No. 294927.

AUTO-OWNERS INSURANCE COMPANY v LEPP, No. 143650; Court of Appeals No. 297534.

OTSEGO COUNTY v BRADFORD SCOTT CORPORATION, No. 143653; Court of Appeals No. 295828.

SIGNATURE BANK v GANSTINE, No. 143654; Court of Appeals No. 295741.

PEOPLE v WILKINS, No. 143655; Court of Appeals No. 304621.

PEOPLE v WILKINS, No. 143657; Court of Appeals No. 304641.

LAMBERT v GREEN OAK TOWNSHIP, No. 143659; Court of Appeals No. 297088.

PEOPLE v CURTIS JONES, No. 143664; Court of Appeals No. 304601.

PEOPLE v JUWUAN LONG, No. 143665; Court of Appeals No. 302912.

PEOPLE v DESKINS, No. 143671; Court of Appeals No. 304076.

PEOPLE v ELBERT SCOTT, No. 143672; Court of Appeals No. 303331.

PEOPLE v DOYLE PALMER, No. 143676; Court of Appeals No. 295309.

PEOPLE v GIBSON, No. 143677; Court of Appeals No. 297814.

VELA v WAYNE COUNTY AIRPORT AUTHORITY, No. 143680; Court of Appeals No. 298478.

PEOPLE v FULBRIGHT, No. 143682; Court of Appeals No. 301285.

KODSY v DEPARTMENT OF TRANSPORTATION, No. 143684; Court of Appeals No. 297833.

HATHAWAY, J., would grant leave to appeal.

PEOPLE v CASE, No. 143687; Court of Appeals No. 294091.

PEOPLE v GOODEN, No. 143688; Court of Appeals No. 296238.

PEOPLE v HARDEMAN, No. 143689; Court of Appeals No. 296806.

PEOPLE v KOSTA, No. 143690; Court of Appeals No. 304066.

PEOPLE v FUTURELL, No. 143695; Court of Appeals No. 304484.

PEOPLE v BOOKER, No. 143696; Court of Appeals No. 304394.

PEOPLE v MASSEY, No. 143697; Court of Appeals No. 297672.

PEOPLE v LUCIANO RIVERA, No. 143702; Court of Appeals No. 304352.

PEOPLE v TUCSOK, No. 143705; Court of Appeals No. 304397.

PEOPLE v QUINTRALL LEE, No. 143707; Court of Appeals No. 304677.

PEOPLE v SAMFILIPPO, No. 143708; Court of Appeals No. 296097.

PEOPLE v COLEMAN, No. 143710; Court of Appeals No. 296756.

PEOPLE v FAISON, No. 143712; Court of Appeals No. 298581.

PEOPLE v WATTERS, No. 143713; Court of Appeals No. 298890.

PEOPLE v STOVALL, No. 143714; Court of Appeals No. 301859.

PEOPLE v MANSBERRY, No. 143716; Court of Appeals No. 304390.

PEOPLE v FITZPATRICK, No. 143718; Court of Appeals No. 297688.

PEOPLE v KAREN SIMMONS, No. 143719; Court of Appeals No. 297928.

PEOPLE v BOBBY WILLIAMS, No. 143722; Court of Appeals No. 297796.

In re VICKERSON ESTATE, No. 143724; Court of Appeals No. 294178.

PEOPLE v THOMAS WASHINGTON, No. 143726; Court of Appeals No. 303622.

PEOPLE v NICOLE PRICE, No. 143727; Court of Appeals No. 298519.

PEOPLE v ORTIZ, No. 143728; Court of Appeals No. 304941.

PEOPLE v CUMMINGS, No. 143729; Court of Appeals No. 304497.

PEOPLE v LOOMIS, No. 143730; Court of Appeals No. 304284.

PEOPLE v BRUCE SILSBY, No. 143734; Court of Appeals No. 302525.

PEOPLE v ARTHUR BRIDGES, No. 143735; Court of Appeals No. 302805.

PEOPLE v UNCAPHER, No. 143737; Court of Appeals No. 304009.

PEOPLE v MICHAEL BROWN, No. 143738; Court of Appeals No. 297659.

PEOPLE v PAUL SIMMONS, No. 143739; Court of Appeals No. 298360.

PEOPLE v STURDEVANT, No. 143743; Court of Appeals No. 295982.

PEOPLE v PRAY, No. 143744; Court of Appeals No. 304744.

PEOPLE v LORING WALKER, No. 143745; Court of Appeals No. 296862.

PEOPLE v JOSHUA MITCHELL, No. 143746; Court of Appeals No. 304815.

PEOPLE v MCCOMBS, No. 143747; Court of Appeals No. 296564.

DETROIT DIESEL CORPORATION v DEPARTMENT OF TREASURY, Nos. 143750 and 143751; Court of Appeals Nos. 297376 and 297377.

PEOPLE v EDMUNDO VASQUEZ, No. 143754; Court of Appeals No. 302147.

PEOPLE v PROFFITT, No. 143755; Court of Appeals No. 301975.

PEOPLE v STONE, No. 143756; Court of Appeals No. 304227.

PEOPLE v MCGRAW, No. 143757; Court of Appeals No. 304830.

SACKLLAH INVESTMENTS LLC v NORTHVILLE TOWNSHIP, No. 143759; Court of Appeals No. 293709.

PEOPLE v DANIEL JOHNSON, No. 143762; Court of Appeals No. 304609.

PEOPLE v MARTIN, No. 143764; Court of Appeals No. 302592.

PEOPLE v REGINALD WILLIAMS, No. 143765; Court of Appeals No. 305049.

PEOPLE v BRAGG, No. 143766; Court of Appeals No. 304549.

PEOPLE v LAWRENCE JACKSON, No. 143767; Court of Appeals No. 298420.

PEOPLE v DOMINIQUE JOHNSON, No. 143768; Court of Appeals No. 304748.

PEOPLE v YOKLEY, No. 143770; Court of Appeals No. 295665.

PEOPLE v REGINA BROWN, No. 143773; Court of Appeals No. 304807.

PEOPLE v SEBASTIAN, No. 143774; Court of Appeals No. 293486.

PEOPLE v ANTHONY ROBINSON, No. 143777; Court of Appeals No. 305349.

PEOPLE v SNYDER, No. 143781; Court of Appeals No. 293972.

PEOPLE v MELTON, No. 143782; Court of Appeals No. 301315.

PEOPLE v SAIN, No. 143783; Court of Appeals No. 297268.

PASCHAL v CITY OF LANSING, No. 143784; Court of Appeals No. 302636. HATHAWAY, J., would grant leave to appeal.

PEOPLE v COX, No. 143787; Court of Appeals No. 297532.

PEOPLE v PETZ, No. 143788; Court of Appeals No. 304746.

PEOPLE v PERRY CARTER, No. 143789; Court of Appeals No. 298148.

PEOPLE v CARGILL, No. 143790; Court of Appeals No. 304789.

PEOPLE v QUINCY WILLIAMS, No. 143795; Court of Appeals No. 304630.

PEOPLE v EBEL, No. 143797; Court of Appeals No. 296285.

PEOPLE v AUTRY, No. 143800; Court of Appeals No. 304654.

PEOPLE v RICE, No. 143801; Court of Appeals No. 304655.

PEOPLE v ANTONE, No. 143802; Court of Appeals No. 297466.

PEOPLE v RUNIONS, No. 143807; Court of Appeals No. 305232.

PEOPLE v ROGER KELLY, No. 143810; Court of Appeals No. 296500.

PEOPLE v MASLONKA, No. 143813; Court of Appeals No. 304898.

PEOPLE v BUCKLES, No. 143815; Court of Appeals No. 298287.

PEOPLE v FLORENCE, No. 143817; Court of Appeals No. 296944.

PEOPLE v YANCEY, No. 143826; Court of Appeals No. 297615.

PEOPLE v RINEHART, No. 143832; Court of Appeals No. 305253.

PEOPLE v DESHAWN BELL, No. 143834; Court of Appeals No. 305196.

PEOPLE v SPARKS, No. 143847; Court of Appeals No. 305219.

LALONDE v J P MORGAN CHASE BANK, No. 143852; Court of Appeals No. 295238.

PEOPLE v AMANDA BENNETT, No. 143854; Court of Appeals No. 305323.

PEOPLE v BRANDON SANFORD, No. 143865; Court of Appeals No. 303903.

PEOPLE v HEWITT, No. 143866; Court of Appeals No. 299241.

PEOPLE v PARTLO, No. 143885; Court of Appeals No. 305444.

PEOPLE v GARY JACKSON, No. 143899; Court of Appeals No. 304312.

PEOPLE v CULLENS, No. 143900; Court of Appeals No. 296492.

PEOPLE v SINGLETON, No. 143902; Court of Appeals No. 300638.

PEOPLE v WALLACE, No. 143913; Court of Appeals No. 301972.

CAVANAGH and MARILYN KELLY, JJ., would grant leave to appeal.

HATHAWAY, J., not participating. Justice HATHAWAY recuses herself and will not participate in this case as she was the presiding trial court judge. See MCR 2.003(B).

PEOPLE v BULLARD, No. 143916; Court of Appeals No. 299876.

PEOPLE v ARBON, No. 143945; Court of Appeals No. 305221.

PEOPLE v DOUGLAS, No. 143952; Court of Appeals No. 304924.

PEOPLE v BENSON JACKSON, No. 143954; Court of Appeals No. 32895.

LEE v DETROIT MEDICAL CENTER, No. 144107; Court of Appeals No. 307164.

Superintending Control Denied December 28, 2011:

ARNOLD v ATTORNEY GRIEVANCE COMMISSION, No. 143772.

MERIWEATHER v ATTORNEY GRIEVANCE COMMISSION, No. 143217.

Reconsideration Denied December 28, 2011:

PEOPLE v BERNARD KELLY, No. 142558; Court of Appeals No. 298250. Leave to appeal denied at 490 Mich 857.

PEOPLE v POE, No. 142582; Court of Appeals No. 299537. Leave to appeal denied at 490 Mich 857.

PEOPLE v CLEVELAND ROGERS, No. 142663; Court of Appeals No. 298070. Leave to appeal denied at 490 Mich 872.

COMMUNITY RESOURCE CONSULTANTS, INC v STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, No. 142905; Court of Appeals No. 293932. Leave to appeal denied at 490 Mich 878.

WOODCARE X, INC v DEPARTMENT OF COMMUNITY HEALTH, No. 142974; Court of Appeals No. 294824. Leave to appeal denied at 490 Mich 873.

PEOPLE v WALLS, No. 143059; Court of Appeals No. 298033. Leave to appeal denied at 490 Mich 860.

BENINATI CONTRACTING SERVICES, INC v VIP COMPANY, No. 143138; Court of Appeals No. 296218. Leave to appeal denied at 490 Mich 873.

PEOPLE v DARRYL JOHNSON, No. 143139; Court of Appeals No. 295980. Leave to appeal denied at 490 Mich 873.

RAY v DEPARTMENT OF CORRECTIONS, No. 143165; Court of Appeals No. 300646. Leave to appeal denied at 490 Mich 873.

PEOPLE v DAVID KING, No. 143182; Court of Appeals No. 294757. Leave to appeal denied at 490 Mich 861.

ANDRUS v CITY OF SOUTHGATE, No. 143323; Court of Appeals No. 296417. Leave to appeal denied at 490 Mich 875.

PEOPLE v HAROLD JOHNSON, No. 143368; Court of Appeals No. 302183. Leave to appeal denied at 490 Mich 875.

Summary Disposition December 29, 2011:

CHASE v RAYMOND, Nos. 143419, 143420, 143421, and 143422; Court of Appeals Nos. 293897, 293899, 296294, and 296925. Pursuant to MCR

7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The reference by counsel for the Raymond and Rosa Parks Institute for Self-Development and Elaine Steele, during the course of oral argument in the Court of Appeals, to the respective percentages of the fees charged by the court-appointed fiduciaries for which he believed the parties to the appeal would be liable, without referring to the terms of the Settlement Agreement, did not constitute a breach of the Settlement Agreement's confidentiality provision, and the finding below that it did is clearly erroneous. The Settlement Agreement contains no provision allocating litigation costs between the parties.

We remand this case to the Wayne County Probate Court for further proceedings not inconsistent with this order. We further instruct the court to implement ¶ 1 of the Settlement Agreement within 30 days of the date of this order, or report to this Court within that time why it does not deem it "practicable" to do so.

The motion to dismiss is denied. We do not retain jurisdiction.

MARILYN KELLY, J., would grant leave to appeal.

MCMURTRIE V EATON CORPORATION, No. 143779; Court of Appeals No. 301005. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse in part the September 30, 2010, decision of the Workers' Compensation Appellate Commission (WCAC) and we remand this case to the Michigan Compensation Appellate Commission (MCAC), as successor to the WCAC, for the MCAC to determine whether the plaintiff's wage loss is due to his injury. The WCAC erred in holding that the Worker's Disability Compensation Act does not require a determination that the plaintiff's wage loss is due to his work-related disability. MCL 418.301(4); *Sington v Chrysler Corp*, 467 Mich 144 (2002); *Kirby v Gen Motors Corp*, 490 Mich 915 (2011). If the MCAC determines that there is a causal connection between the plaintiff's disability and his wage loss, then the MCAC shall determine the extent of the plaintiff's partial disability and make the commensurate award of wage loss benefits. MCL 418.361(1); *Lofton v Autozone, Inc*, 482 Mich 1005 (2008); *Umphrey v Gen Motors Corp*, 489 Mich 978 (2011). We do not retain jurisdiction.

CAVANAGH, J., concured in the result.

MARILYN KELLY and HATHAWAY, JJ., would deny leave to appeal.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered December 29, 2011:

PEOPLE V SHAWN BROWN, No. 143733; Court of Appeals No. 305047. At oral argument, the parties shall address what relief, if any, is available to the defendant under the following circumstances. The defendant pleaded guilty to second-degree home invasion as a second-offense habitual offender and, as part of the plea proceeding pursuant to MCR 6.302(B)(2), was informed that his maximum possible sentence was 15 years, despite the fact that his maximum sentence as a second-offense habitual offender was 22½ years. At sentencing, the trial court imposed an enhanced maximum sentence of 22½ years. The parties may file supplemental

briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

Leave to Appeal Denied December 29, 2011:

PROGRESSIVE MICHIGAN INSURANCE COMPANY v SMITH, No. 141255; reported below: 287 Mich App 537. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of December 17, 2010. The application for leave to appeal the March 16, 2010, judgment of the Court of Appeals is denied.

YOUNG, C.J. (*concurring*).

> *The judicial philosophical dilemma in statutory interpretation is . . . whether the "jurist interpreter" will be faithful to the actual statutory text and thus the intent of the lawgiver, or whether the jurist will be faithful to his or her own subjective policy desires*.
>
> —Robert P. Young, Jr., *A Judicial Traditionalist Confronts Justice Brennan's School of Judicial Philosophy*.[1]

The dissents of Judge MARKEY in the Court of Appeals and Justice MARILYN KELLY in this Court illustrate the interpretive "dilemma" that I describe above when judges choose to ignore the statutory words.

I concur in this Court's order vacating our prior order in this case and denying leave to appeal. This is a simple case. MCL 500.3009(2) clearly and unambiguously requires that insurance companies place particular statutorily specified notice language in certain insurance policy documents when excluding a named driver pursuant to that provision.[2] Progressive Michigan Insurance Company, the insurer, failed to comply

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[1] 33 Okla City U L R 263, 280 (2008).

[2] The Legislature has made it possible for insureds and insurers to exclude bad drivers from a policy. The reason why an insured would wish to do so is obvious: the coverage of a bad driver in the household drastically increases the price of insurance. In order to make this exclusion, though, the Legislature has required that certain policy documents have the following specific disclaimer, otherwise the named driver exclusion "shall not be valid." MCL 500.3009(2) provides:

> If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance:
>
> Warning—when a named excluded person operates a vehicle all liability coverage is void—no one is insured. Owners of the vehicle

with this requirement and is thus required to pay the claim. I write to respond to the dissents in the Court of Appeals and this Court.

There is no ambiguity in the requirement that the Legislature's precise statutory disclaimer must be used in insurance policy documents in order to effectuate the exclusion of a bad driver. In this case, Progressive failed to include the required statutory disclaimer but paraphrased it, suggesting that its paraphrase was "close enough" to avoid paying the claim. The dissents here and in the Court of Appeals believe that "close enough" is as valid in law as it is in horseshoes.

However, the majority of the Court of Appeals correctly held that, because the notice language employed on the insured's certificate of insurance in this case deviated from that statutory language, Progressive did not comply with the statutory notice requirement. Thus, the court was obligated to enforce the Legislature's directive that the named driver exclusion "shall not be valid."[3] Progressive was required to pay the claim of the imperfectly excluded bad driver and appealed here from that decision.

The dissenting opinion of Judge MARKEY in the Court of Appeals, although professing an adherence to the philosophy of interpreting the law as plainly written, nevertheless *ignored* the statutory language:

> [O]n rare occasion there may arise a situation where following this philosophy with myopic rigidity effects not only a complete thwarting of the Legislature's intent but also a profoundly unfair and inequitable result. . . . Must we as strict constructionists abandon "common sense" and render a decision not only remarkably hyper-technical legally but also profoundly unjust and jarring to what I will presume to say is the average person's sense of justice and fair play? I think not."[4]

While my concurring colleague may argue that the result urged by the dissent is not so unreasonable, statements such as this represent a shocking departure from the rule of law.[5] All Michigan citizens should be

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> and others legally responsible for the acts of the named excluded person remain fully personally liable.

[3] See *Progressive Mich Ins Co v Smith*, 287 Mich App 537 (2010).

[4] *Id.* at 546, 550 (MARKEY, J., dissenting).

[5] My concurring colleague correctly states that the obligation of a judge committed to the rule of law is to read the law "reasonably." Yet I believe that it is decidedly *un*reasonable and "indefensible," to sanction the view that a court may substitute its own words, even if they are synonymous, for those chosen by the Legislature. As my concurring colleague has otherwise observed, "we believe that it is the constitutional duty of this Court to interpret the words of the lawmaker, in this case the Legislature, and *not* to substitute our own policy preferences in order to make the law less 'illogical.' . . . It is only by interpretations of the law that are in accord with the words of the lawmaker—that is, interpretations in which

extraordinarily troubled by any judge who advances the notion that the rule of law must be enforced *unless* a judge finds an outcome in a particular case to be one of which he personally disapproves. In a constitutional republic, judges have no such authority, and the rule of law crumbles where a constitutional, validly enacted statutory mandate can be ignored simply because it offends a judge's sensibilities—even if on "rare occasion[s]."

With all due respect to Judge MARKEY, our judicial oaths require judges to enforce the *Legislature's* policy choices, even when we may personally find the outcome in a given case "unjust," "inequitable," "jarring," "hyper-technical," or contrary to what we intuit an "average person's" sensibilities to be.[6] As this Court has stated, it is a mere "caricature" of judicial restraint for a judge "to assert that her common sense should be allowed to override the language of the statute."[7]

As Judge MURRAY aptly noted in his concurring opinion in the Court of Appeals, our judicial duty is more than to "almost always" apply a statute's unambiguous words to the facts presented.[8] The law must *always* guide the outcome, regardless of whether a judge perceives that outcome in a given case to be formalistic or "inequitable."

This Court has prided itself on its commitment to the rule of law, and in particular a return to fundamental constitutional principles regarding judicial interpretation of statutes.[9] This has been true even where, as a

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judges look *outside* themselves for a source of law—that the decisions of courts are truly removed from the realm of politics and policymaking." *Robertson v DaimlerChrysler Corp*, 465 Mich 732, 758, 761 (2002).

[6] The conclusion of my dissenting colleague on this Court suffers from the same analytical and interpretative errors as that of Judge MARKEY. See *post* at 981-982 (MARILYN KELLY, J., dissenting). The dissent here is content to allow a deviation from the statutory mandate because Progressive's decision to use "more plain-English" words rather than the statutorily mandated words satisfies the "intent" of MCL 500.3009(2). Doing so, my dissenting colleague here urges, is apparently appropriate because it avoids "elevat[ing] form over substance" and, therefore, prevents "an unreasonably harsh and unjust result." The goal exhibited in the dissent here and in the Court of Appeals—to effectuate an intent other than that plainly stated in the statutory text—fails to apply first principles of judicial interpretation.

[7] *Elezovic v Ford Motor Co*, 472 Mich 408, 425 n 23 (2005).

[8] *Progressive Mich Ins Co*, 287 Mich App at 544 (MURRAY, J., concurring).

[9] See, e.g., *People v Dowdy*, 489 Mich 373 (2011); *Allison v AEW Cap Mgt*, 481 Mich 419 (2008); *Rowland v Wash Co Rd Comm'n*, 477 Mich 197 (2007); *People v Derror*, 475 Mich 316 (2006); *Devillers v Auto Club Ins Ass'n*, 473 Mich 562 (2005); *Mayor of Lansing v Mich Pub Serv Comm*, 470 Mich 154 (2004); *Taylor v Gate Pharm*, 468 Mich 1 (2003); *Stokes v*

personal matter, a Justice may be discomforted by the ultimate result.[10] But in a government characterized by the separation of powers, the people of this state elect judges to enforce the law as the political branches of our government have given it to us.

The rule of law requires a judge to be subservient to the law itself, not the law to be subservient to the personal views of a judge.

MARKMAN, J. (*concurring*). Although I reach the same result as the Chief Justice, and, even had I not, I would have articulated my position much differently than do the dissents in this Court and in the Court of Appeals, I nonetheless respectfully believe that the Chief Justice is overly severe in his criticism of these dissents.

The issue here is whether an insurance policy stating that an owner of an insured vehicle, under specified circumstances, remains "personally *responsible*" conforms with a statute requiring that all policies must communicate that an owner, under these circumstances, remains "personally *liable*." In my judgment, plaintiff-insurer's insurance policy did not satisfy the statute because an exact identity in language is required in the instant circumstances, in which an insurance statute has specified precise language for inclusion in such a policy. However, I also believe that this is a case in which a judge who adheres to the interpretative philosophy articulated by the Chief Justice, as do I, may quite reasonably disagree with his, and my, conclusion. In fairly giving meaning to the law, the obligation of the "textualist" or "interpretivist" is not to read the law "literally" or "narrowly," or to engage in "strict construction," but it is simply to read the law "reasonably." In light of this premise, I do not believe that either of the dissents has reached an indefensible conclusion. A judge who views the difference between "liability" and "responsibility" as being of no reasonable consequence in the insurance policy at issue is not "ignoring words," engaging in a "shocking departure from the rule of law," or otherwise acting in disregard of his or her "oath of office." Nor do I believe, as suggested by the Chief Justice's citation to *People v McIntire*, that a judge who undertakes within the most narrow realm to consider the genuine "absurdity" of a result is acting in violation of his or her judicial powers. See *Cameron v Auto Club Ins Ass'n*, 476 Mich 55, 78-86 (2006) (MARKMAN, J., concurring). While I respect the Chief Justice's convictions—and while I appreciate his apparently-approving references to my own past jurisprudential statements, to which I continue to adhere—I also believe that there are many better cases in which to bring those convictions to bear.

Millen Roofing Co, 466 Mich 660 (2002); *Wickens v Oakwood Healthcare Sys*, 465 Mich 53 (2001); *Robinson v City of Detroit*, 462 Mich 439 (2000); *People v McIntire*, 461 Mich 147 (1999).

[10] See, e.g., *Stokes*, 466 Mich at 677 (MARKMAN, J., concurring) (stating that even where a result is "unfair" and "highly inequitable," "we cannot allow equity to contravene the clear statutory intent of the Legislature.").

MARILYN KELLY, J. (*dissenting*).

> [C]anons [of interpretation] are not mandatory rules. They are guides that "need not be conclusive." They are designed to help judges determine the Legislature's intent as embodied in particular statutory language. And other circumstances evidencing congressional intent can overcome their force. [*Chickasaw Nation v United States*, 534 US 84, 94 (2001) (citations omitted).]

Because I agree with Judge MARKEY's Court of Appeals dissent, I dissent from the Court's decision to vacate our December 17, 2010, order granting leave to appeal and denying plaintiff's application for leave to appeal. I would reverse the Court of Appeals decision and reinstate the decision of the trial court.

Defendant Smith owned a vehicle but had no driver's license. Thus, he could not obtain no-fault insurance or license plates for the vehicle. He added defendant Harris to the title as a co-owner of the vehicle. Harris was able to obtain insurance from Progressive but signed a form listing Smith as an excluded driver under the policy, as permitted by MCL 500.3009(2).

Smith drove the vehicle and became involved in a collision with another vehicle owned by defendants Scott and Andrea Mihelsic. The Mihelsics filed a third-party negligence suit against Smith that he failed to defend, resulting in a default judgment against him. Progressive then brought this declaratory judgment and filed a motion for summary disposition arguing that it had no duty to indemnify Smith because he was a named excluded driver under MCL 500.3009(2). The Mihelsics opposed the motion and filed their own motion for summary disposition, arguing that the exclusion was invalid. Progressive, they argued, had failed to use the exact language that appears in the statute. The trial court denied the Mihelsics' motion and granted Progressive's motion for summary disposition.

The Court of Appeals reversed the trial court in a 2-1 decision. It concluded that Progressive's failure to use the exact language that appears in MCL 500.3009(2) rendered the named-driver exclusion invalid.

The principal question on appeal is whether Progressive's use of the word "responsible" in place of "liable" on Harris's certificate of insurance, by itself, renders the named-driver exclusion invalid. The language of MCL 500.3009(2) provides:

> If authorized by the insured, automobile liability or motor vehicle liability coverage may be excluded when a vehicle is operated by a named person. Such exclusion shall not be valid unless the following notice is on the face of the policy or the declaration page or certificate of the policy and on the certificate of insurance: Warning—when a named excluded person operates a vehicle, all liability coverage is void—no one is insured. Owners of the vehicle and others legally responsible for the acts of the named excluded person remain fully personally liable.

Progressive used the warning language verbatim on Harris's insurance declaration. However, on her certificate of insurance, it replaced the word "liable" with the more plain-English "responsible."

To begin with, nothing signals that the Legislature intended that the warning language it used in the statute must be used verbatim in insurance policies. The statute does not require it nor does it employ block quoting or quotation marks to show that its wording is the only way to communicate its message.

Moreover, this Court has "frequently observed that statutory interpretation is primarily an exercise in locating the intent of the Legislature. . . . While examination of statutory language is certainly a crucial element in that inquiry, . . . a dogged literalism should not be employed to defeat the Legislature's intent."[1] The language Progressive used on the certificate of insurance satisfied the intent of the Legislature. The intent of MCL 500.3009(2) is to inform policy owners that their insurance is ineffective for damages caused by an excluded driver and that they risk personal responsibility for those damages. Black's Law Dictionary defines "liable" as "responsible or answerable in law; legally obligated."[2] "Responsibility" is defined as "liability."[3] The insertion of the word "responsible" in place of "liable" did not materially change the meaning of the warning. Moreover, nothing in the record indicates that it misled or confused either Smith or Harris. To find the named-driver exclusion that was used here invalid is to elevate form over substance and defy common sense.

Chief Justice YOUNG asserts in his concurring statement that Judge MARKEY's position is a "shocking departure from the rule of law." He is perhaps too readily shocked. Her statement and mine are not departures at all. Our reading is faithful to the statutory language and effects exactly what the Legislature intended when it enacted this law: an exempted driver should not receive insurance benefits. The result of the majority's decision is to enforce the law in a manner that violates the Legislature's intent.[4] My personal views play no part in my interpretation. I interpret the statutory language to conform with the obvious reason it was written.[5]

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[1] *Goodridge v Ypsilanti Twp Bd*, 451 Mich 446, 453 n 8 (1996).

[2] Black's Law Dictionary (8th ed).

[3] *Id*.

[4] *United States v Ron Pair Enterprises*, 489 US 235, 242 (1989). "The plain meaning of legislation should be conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.' "; *Nat Railroad Pass Corp v Nat Assoc of Railroad Pass*, 414 US 453, 458 (1974). "[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent."

[5] *Salas v Clements*, 399 Mich 103, 109 (1976) (departure from literal construction of a statute is justified when such construction would

In this case, Smith knew he could not obtain insurance, so he got Harris to buy it. He then drove his truck illegally with no license and no insurance. It is quite a departure from the statute's intent to require Progressive to indemnify Smith when he knowingly violated the law and knew himself to be excluded from the insurance policy. The Court requires Progressive to provide insurance coverage for a party it never had a contract with and never agreed to insure.

Moreover, although the Mihelsics are correct that the insurance commissioner's Bulletin 79-11 addresses the named-driver exclusion and quotes the § 3009(2) language, Bulletin 81-4 also deals with the excluded-driver exception. It addresses certificates of insurance, shows examples of what the forms should look like and states what language should be on the forms. In Bulletin 81-4, the commissioner writes that the wording on the certificate "shall appear as follows." It then uses the word "responsible" in place of "liable."[6] Although the bulletins do not supplant the statute, there is unrefuted evidence that the industry relies on the commissioner for guidance. Thus, I do not think it unreasonable for Progressive to have relied on Bulletin 81-4 for direction in wording its insurance certificates.

The named-driver exclusion in this case should be found valid and enforceable. Its deviation in wording from MCL 500.3009(2) is not material. Smith was not confused by it. It would seem an unreasonably harsh and unjust result to allow Smith to profit from his wrongful actions.

Therefore, I dissent and would reverse the Court of Appeals and reinstate the decision of the trial court.

OLIVER v PERRY, No. 143424; Court of Appeals No. 296871.

OAK CREEK APARTMENTS, LLC v GARCIA, No. 144201; Court of Appeals No. 306675.

In re SANDERS, No. 144222; Court of Appeals No. 304099.

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produce absurd and unjustified results and would be clearly inconsistent with the purposes and policies of the act); *People v Bewersdorf*, 438 Mich 55, 68 (1991) (An unambiguous statute is to be given effect, although departure may be justified when literal construction would produce absurd and unjust results and would be clearly inconsistent with the purposes and policies of the act in question.); *Franges v Gen Motors Corp*, 404 Mich 590, 612 (1979) (Statutes must be construed to prevent absurdity, hardship, injustice, or prejudice to the public interest.); *Webster v Rotary Elec Steel Co*, 321 Mich 526, 531 (1948) (The occasion of and necessity for a statute are matters of judicial concern, and the purpose of a statute should be effected if possible. Its spirit and purpose should prevail over its strict letter. In construing a statute, injustice in its application should be prevented and absurd consequences avoided.).

[6] Bulletin: Insurance Bureau 81-4, *Automobile Insurance Policies; Certificates of Insurance* (1981).

Leave to Appeal Denied January 11, 2012:

In re BENSON, No. 144139; Court of Appeals No. 305300.

Summary Disposition January 12, 2012:

TEEGARDEN v HUNT , No. 144124; Court of Appeals No. 302406. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration, as on leave granted, of whether the trial court abused its discretion when it denied the defendants' motion to strike the testimony of Elliot David Felman, M.D. In particular, we direct the Court of Appeals to consider whether Dr. Felman's proposed testimony meets the criteria of MCL 600.2955 and MRE 702. See *Craig v Oakwood Hosp*, 471 Mich 67 (2004), and *Gilbert v DaimlerChrysler Corp*, 470 Mich 749 (2004). We further order that trial court proceedings are stayed pending the completion of this appeal. On motion of a party or on its own motion, the Court of Appeals may modify, set aside, or place conditions on the stay if it appears that the appeal is not being vigorously prosecuted or if other appropriate grounds appear. We do not retain jurisdiction.

MARILYN KELLY and HATHAWAY, JJ., would remand this case to the trial court for an evidentiary hearing to determine whether the testimony of the plaintiff's expert witness meets the criteria of MCL 600.2955 and MRE 702.

Summary Disposition January 13, 2012:

PEOPLE v PEARSON, No. 143411; Court of Appeals No. 296252. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the portion of the judgment of the Court of Appeals affirming the trial court's scoring of offense variable (OV) 13 and we remand this case to the Kent Circuit Court for resentencing. On remand, we instruct the trial court to assess zero points for OV 13. In all other respects, leave to appeal is denied.

The trial court scored 25 points under OV 13. Pursuant to MCL 777.43(1)(c), 25 points should be scored under OV 13 when "the offense was part of a pattern of felonious criminal activity involving 3 or more *crimes against a person*" (emphasis added). The three offenses upon which the trial court relied in assessing 25 points for OV 13 included defendant's convictions of armed robbery, unlawful imprisonment, and conspiracy to commit armed robbery. Both armed robbery and unlawful imprisonment are legislatively classified as "crime[s] against a person." MCL 777.16y; MCL 777.16q. However, conspiracy is classified as a "crime against public safety." MCL 777.18. In *People v Bonilla-Machado*, 489 Mich 412 (2011), this Court recently held that for purposes of scoring OV 13, a "crime against public safety" may not be transformed into a "crime against a person," in order to establish a continuing pattern of criminal behavior under OV 13. That rationale applies here. Therefore, the trial court erred in scoring OV 13 because there were not "3 or more *crimes against a person*."

In upholding the trial court's assessment of 25 points under OV 13, the Court of Appeals interpreted MCL 777.21(4) to allow the reclassification of defendant's conspiracy conviction as a "crime against a person" for purposes of scoring OV 13 based on the nature of the underlying offense of which defendant was convicted. That is, because the offense underlying defendant's conspiracy conviction was armed robbery, which is designated as a "crime against a person," defendant's conspiracy conviction likewise constituted a "crime against a person," sufficient to satisfy OV 13. However, when an offender is being sentenced for a violation of MCL 777.18, MCL 777.21(4) merely directs a court to "determine the offense variable level by scoring the offense variables for the underlying offense." It does not allow the offense category underlying the conspiracy to dictate the offense category of the conspiracy itself for purposes of scoring OV 13.

Because the Court of Appeals' decision contravenes this Court's decision in *Bonilla-Machado* and the deduction of the 25 points erroneously scored under OV 13 affects defendant's guidelines range, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82 (2006).

YOUNG, C.J., would deny leave to appeal for the reasons set forth in his dissenting opinion in *People v Bonilla-Machado*, 489 Mich 412, 441-450 (2011).

Leave to Appeal Denied January 13, 2012:

PEOPLE v MICHAEL COOLEY, No. 142228; Court of Appeals No. 292942. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of April 8, 2011. The application for leave to appeal the October 19, 2010, judgment of the Court of Appeals is denied.

In re TET, No. 144279; Court of Appeals No. 304232.

Reconsideration Denied January 13, 2012:

In re BRINKER, No. 143871; Court of Appeals No. 302305. Summary disposition at 490 Mich 916.

Statements Regarding Decisions on Motion for Disqualification Entered January 19, 2012:

PARISE v DETROIT ENTERTAINMENT, No. 144072; Court of Appeals No. 295183.

YOUNG, C.J. I deny plaintiff's renewed motion seeking my disqualification. I deny plaintiff's additional claim regarding the alleged donations made to Candice Miller for Congress, followed by Candice Miller for Congress' alleged donations to the Michigan Republican Party, followed by the alleged donation by the Michigan Republican Party to my Supreme Court campaign in 2010. Even if true, this new allegation is one degree

of separation *further* than the subject matter of the previous motion for disqualification. Accordingly, it too is insufficient to give rise to an appearance of impropriety. Moreover, plaintiff's allegations regarding professional and consulting relationships, even if true, are too attenuated to give rise to an appearance of impropriety. Plaintiff still does not claim that I am actually biased for or against either party in this matter. Because I am not biased for or against either party in this matter, I deny plaintiff's motion seeking my disqualification.

MARY BETH KELLY, J. I deny plaintiff's motion seeking my disqualification. Plaintiff's allegation that Candice Miller for Congress contributed donations to the Michigan Republican Party, which then allegedly made donations to my 2010 Supreme Court campaign, is insufficient to give rise to an appearance of impropriety. Additionally, plaintiff has not raised any specific allegation that I am biased against either party in this matter. Accordingly, because I am not actually biased for or against either party, and because plaintiff has not alleged a sufficient basis demonstrating an appearance of impropriety, I deny plaintiff's motion for my disqualification.

Order Denying Motion for Disqualification Entered January 20, 2012:

PARISE V DETROIT ENTERTAINMENT, No. 144072; Court of Appeals No. 295183.

On order of the Court, the motion for full-Court review of the motion to disqualify Chief Justice YOUNG and Justice MARKMAN is considered, and it is granted. Upon full-Court consideration of the plaintiff's motion, we deny the motion for the reason that no justice is persuaded that there is any ground for the disqualification of Chief Justice YOUNG or Justice MARKMAN.

YOUNG, C.J. (*not participating*). I do not participate in the order or the full Court's decision on the motion for disqualification of another justice, pursuant to MCR 2.003(D)(3)(b), for the reasons stated in my November 25, 2009, dissent from the rule's promulgation[1] and in my March 31, 2010, statement of nonparticipation in a similar motion in *Pellegrino v Ampco Sys Parking*.[2] I believe that rule to have serious constitutional flaws.

Statement Regarding Decision on Motion for Disqualification Entered January 23, 2012:

LAWRENCE V BOARD OF LAW EXAMINERS, No. 144191.

MARKMAN, J. Plaintiff has moved for my disqualification on the basis of remarks that I made in introducing opposing counsel, John Fedynsky, as the keynote speaker at a 2010 meeting of the Michigan Supreme Court Historical Society in which I allegedly described Mr. Fedynsky as "the finest and most enterprising young man that I know," and because I authored a foreword to a book written by Mr. Fedynsky on Michigan's

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[1] See 485 Mich cxxx, clxvii-clxxxv (YOUNG, J., dissenting).

[2] 485 Mich 1134, 1155-1165 (2010) (YOUNG, J., not participating).

county courthouses. Although my prepared remarks, from which I do not recall departing, indicate that I introduced Mr. Fedynsky as "*one* of the finest and most enterprising young *men* that I know," I will stipulate that I have very high regard for Mr. Fedynsky.

MCR 2.003 provides that disqualification is warranted where the judge is "biased or prejudiced for or against" an attorney. MCR 2.003(C)(1)(a). This requires a showing of *actual* bias or prejudice, which has been defined by this Court as " 'an attitude or state of mind that belies an aversion or hostility of a kind or degree that a fair-minded person could not entirely set aside when judging certain persons or causes.' " *Cain v Dep't of Corrections*, 451 Mich 470, 495 n 29 (1996), quoting *United States v Conforte*, 624 F2d 869, 881 (CA 9, 1980).

No grounds for my disqualification are present in this regard because I am not actually biased for Mr. Fedynsky. As I suspect is true of most judges, there are many attorneys who appear before this Court whom I know and respect, and many attorneys whom I do not know at all. But this is of little consequence in the judicial process, for it is not the lawyer I am judging, but the law. That a judge has some personal perspective concerning a lawyer does not signify that he or she cannot set aside this perspective and impartially assess the merits of the case being argued. I do not have an "attitude or state of mind" regarding Mr. Fedynsky "of a kind or degree that a fair-minded person could not entirely set aside."

Nor is the "appearance of impropriety" implicated in this case. MCR 2.003(C)(1)(b)(ii). I do not believe that a reasonable person would perceive my laudatory introductory remarks of Mr. Fedynsky as impairing my ability to carry out my judicial responsibilities with impartiality. Nor do I believe that a reasonable person would perceive my writing a foreword to Mr. Fedynsky's book—a book in which I have no financial stake—as impairing my ability to carry out these responsibilities with impartiality. Accordingly, plaintiff's motion for my disqualification is denied.

Summary Disposition January 25, 2012:

HARING CHARTER TOWNSHIP v CITY OF CADILLAC, Nos. 142117 and 142118; reported below: 290 Mich App 728. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we affirm the October 12, 2010, judgment of the Court of Appeals. Although courts are not bound by the parties' determination that a case is ripe, we agree with the parties that, considering all the circumstances, this case is ripe for adjudication and that the claims are not contingent or hypothetical.

The grant of leave to appeal also asked the parties to address whether *Washtenaw Co Health Dep't v T & M Chevrolet, Inc*, 406 Mich 518, 525-526 (1979), which held that when "an available sewer line crosses municipal boundaries, the municipality operating the sewer system may not condition connection on annexation of the properties involved when connection means abatement of a public health hazard," was correctly decided and, if so, whether it requires the defendant to continue providing sewage transportation and treatment services to the plaintiff townships. However, because there is no "public health hazard" requir-

ing abatement presented in this case, the issue is not directly before the Court at this time and need not be decided.

TONDREAU v HENRY FORD MACOMB HOSPITAL, No. 143345; Court of Appeals No. 300026. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v KEITH ROBINSON, No. 143380; Court of Appeals No. 298929. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PRICE v CITY OF ROYAL OAK, No. 143443; Court of Appeals No. 296483. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to that court for reconsideration of the issue of defendant Pamar Enterprises, Inc.'s duty to the plaintiffs in light of *Loweke v Ann Arbor Ceiling & Partition Co, LLC,* 489 Mich 157 (2011). We do not retain jurisdiction.

Leave to Appeal Denied January 25, 2012:

PATTERSON v NICHOLS, No. 142441; Court of Appeals No. 296198. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of May 25, 2011. The application for leave to appeal the December 7, 2010, judgment of the Court of Appeals is denied.

PRINS v MICHIGAN STATE POLICE, No. 142841; reported below: 291 Mich App 586. Leave to appeal having been granted and the briefs and oral arguments of the parties having been considered by the Court, we vacate our order of June 29, 2011. The application for leave to appeal the February 15, 2011, judgment of the Court of Appeals is denied.

YOUNG, C.J. (*dissenting*). I respectfully dissent from this Court's order. MCL 15.240(1) requires a plaintiff suing under the Freedom of Information Act (FOIA), MCL 15.231 *et seq.*, to file her complaint within 180 days of the public body's "final determination." Pursuant to MCL 15.235, the complaint must be filed within 180 days of the day on which the notice is created or within 180 days of when the public body fails to respond to the request. In this case, Nancy Prins did not file her complaint within 180 days of the determination by the Michigan State Police (MSP) to deny her request for a public record. Accordingly, Prins's complaint was not timely filed. I would therefore reverse the judgment of the Court of Appeals and reinstate the circuit court's grant of summary disposition to defendants.

On May 4, 2008, Michigan State Police Trooper James Yeager pulled Prins over. The trooper issued Prins's passenger, Jack Elliott, a ticket for not wearing a seat belt. On July 22, 2008, Prins submitted a request to MSP under the FOIA. Prins requested a copy of the video from the traffic stop. On Saturday, July 26, 2008, MSP issued a written notice in response to Prins's request. MSP mistakenly stated in the notice that the video no

longer existed. The notice was postmarked July 29, 2008. On October 28, 2008, Trooper Yeager produced the video from the traffic stop at Elliott's formal hearing.

Prins filed suit against MSP and MSP Assistant Freedom of Information Coordinator David Fedewa on January 26, 2009. January 26, 2009, was 184 days after the date on which MSP denied Prins's request and 181 days after the notice was postmarked. If the statute of limitations applies to the date of postmark as the Court of Appeals held, then the last day of the period would have been a Sunday. MCR 1.108(1) does not count the last day of the period if it falls on a Sunday.[1] Thus, if the statute of limitations applies to the date of postmark, plaintiff's complaint was timely. Conversely, if the statute of limitations applies to the date MSP created the notice, plaintiff's complaint was untimely.

Defendants moved for summary disposition. Defendants argued that Prins's lawsuit was untimely because Prins filed suit after the applicable period of limitations had expired. The circuit court held that the 180-day limitations period provided in MCL 15.240(1)(b) was triggered by the date the denial notice was created and had run before the filing of Prins's complaint. The court accordingly granted defendants' motion for summary disposition. On appeal, the Court of Appeals panel reversed. The Court of Appeals held that Prins's complaint was timely because it was filed within 180 days of when the notice of denial was postmarked. The Court of Appeals reasoned that MSP did not "deny" Prins's request until MSP mailed the denial on July 29, 2008. The Court of Appeals determined that a public body must " 'send[] out' or officially circulate[] its denial of a public record request" in order to trigger the running of the period of limitations.[2] We granted MSP's application for leave to appeal.[3]

The fundamental purpose of statutory interpretation is to ascertain and give effect to the intent of the Legislature.[4] To achieve this end, a court should consider the plain meaning of a statute's words and their "placement and purpose in the statutory scheme."[5] The statute at issue here, MCL 15.240(1), provides in pertinent part:

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[1] MCR 1.108 provides in pertinent part:

> In computing a period of time prescribed or allowed by these rules, by court order, or by statute, the following rules apply:
>
> (1) The day of the act, event, or default after which the designated period of time begins to run is not included. The last day of the period is included, unless it is a . . . Sunday . . .; in that event the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday, or day on which the court is closed pursuant to court order.

[2] *Prins v Mich State Police*, 291 Mich App 586, 591 (2011).

[3] *Prins v Mich State Police*, 489 Mich 979 (2011).

[4] *In re Certified Question*, 433 Mich 710, 722 (1989).

[5] *Sun Valley Foods Co v Ward*, 460 Mich 230, 237 (1999) (quotation marks and citation omitted).

> If a public body makes a final determination to deny all or a portion of a request, the requesting person may do 1 of the following at his or her option:
>
> * * *
>
> (b) Commence an action in the circuit court to compel the public body's disclosure of the public records within 180 days after a public body's final determination to deny a request.

MCL 15.240(1)(b) thus allows a person whose FOIA request has been denied to commence an action in circuit court within 180 days after a public body's "final determination" to deny a request.

The phrase "final determination" is used twice in MCL 15.235.[6] MCL 15.235(3) states that "[f]ailure to respond to a request pursuant to subsection (2) constitutes a public body's final determination to deny the request." MCL 15.235(4) states that "[a] written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request." Thus, a public body's failure to respond in compliance with MCL 15.235(2) and a public body's written notice denying a request *both* constitute a public body's "final determination."

In this case, MCL 15.235(3) is not applicable for purposes of determining what constituted MSP's final determination. MSP received Prins's request on July 22, 2008. MSP's written notice denying Prins's request was postmarked on July 29, 2008. Thus, MSP responded within five business days of receiving Prins's request. Since MSP complied with MCL 15.235(2), MCL 15.235(3) is not relevant for determining the date of MSP's final determination.

The "final determination" provision of MCL 15.235(4) is applicable to Prins's situation because MSP created a "written notice denying a request for a public record . . . ." The key question in this case is not

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[6] MCL 15.235 provides in pertinent part:

> (2) Unless otherwise agreed to in writing by the person making the request, a public body shall respond to a request for a public record within 5 business days after the public body receives the request . . . .
>
> (3) Failure to respond to a request pursuant to subsection (2) constitutes a public body's *final determination* to deny the request. In a circuit court action to compel a public body's disclosure of a public record under [MCL 15.240], the circuit court shall assess damages against the public body . . . .
>
> (4) A written notice denying a request for a public record in whole or in part is a public body's *final determination* to deny the request or portion of that request. [Emphasis added.]

whether there was a written notice, but when the 180-day period began. MCL 15.240(1) states that suit must be filed within 180 days of a public body's "final determination." MCL 15.235(4) states that "[a] written notice denying a request for a public record in whole or in part is a public body's final determination to deny the request or portion of that request." Read together, these provisions require a plaintiff to file suit within 180 days of the public body's written notice denying a request for a public record. The grammatical structure of MCL 15.235(4) suggests that a public body makes a final determination when it creates a written notice denying a request for a public record. The subject of the sentence in MCL 15.235(4) is the word "notice." The word "is" in MCL 15.235(4) is the verb, which indicates a state of being. By stating that a written notice *is* a public body's final determination and that a requester must commence suit within 180 days of a final determination, the Legislature intended to limit requesters to filing within 180 days of when the notice came into existence.[7]

The Court of Appeals improperly conflated the two ways in which a public body can make a final determination for purposes of MCL 15.240(1)(b). The Court of Appeals reasoned that the 180-day period is only triggered when the public body fulfills all of its statutory duties:

> These definitions imply that a public body cannot fulfill its statutory obligation to issue a notice merely by creating a document denying a record request. Rather, the Legislature intended that the public body undertake an affirmative step reasonably calculated to bring the denial notice to the attention of the requesting party. Thus, a public body has not satisfied the statute's notice requirement until it "sends out" or officially circulates its denial of a public record request.[8]

I agree that a public body does not satisfy its statutory duties by merely creating a written notice denying a request for a public record. However, there is no textual support for the Court of Appeals' conclusion that a

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[7] This conclusion is limited to situations in which MCL 15.235(3) does not apply. When a public body creates a written notice denying a request for a public record in whole or in part but fails to issue such a notice "within 5 business days," there would effectively be two final determinations. The written notice would be a final determination under MCL 15.235(4) and the failure to respond "within 5 business days" would constitute a final determination under MCL 15.235(3). To comply with MCL 15.240(1)(b), the requester would have to file within 180 days of the creation of the written notice or the failure to comply with MCL 15.235(2) because MCL 15.240(1)(b) only requires the requester to file suit "within 180 days after a public body's final determination to deny a request." However, this is not the situation presented because MSP responded within 5 business days of receiving Prins's request.

[8] *Prins*, 291 Mich App at 591.

public body's "fulfill[ment of] its statutory obligation" starts the 180-day period.[9] MCL 15.240(1) does not state that a plaintiff must file her complaint within 180 days of the public body's fulfillment of its statutory obligations. MCL 15.240(1) states that a complaint must be filed within 180 days of the public body's "final determination." Thus, the period begins to run on the day that the notice is created or when the public body fails to respond in the manner prescribed by MCL 15.235(2).

The Court of Appeals tried to justify its interpretation of the statute by claiming that its "construction of the FOIA prevents a public body's inadvertent failure to timely mail a denial letter from unduly shortening the 180-day period of limitation."[10] The Court of Appeals apparently believed that if a public body created a notice and then delayed mailing the letter, potential plaintiffs would lose a significant part of the period in which they could file a suit against that public body. However, the Court of Appeals' decision is grounded in an unsubstantiated fear that the appropriate interpretation of the statute will result in a significant burden to plaintiffs. In short, the Court of Appeals' interpretation is not necessary to prevent an undue shortening of the period *because MCL 15.235(3) already prevents such a result*.

MCL 15.235(2) requires a public body to respond to a FOIA request within five days of receiving the request. MCL 15.235(3) states that failure to respond to the FOIA request within five days constitutes the public body's "final determination." Under MCL 15.240(1), such a "final determination" triggers the plaintiff's cause of action and commences the 180-day period.[11] For all practical purposes, the statutory framework allows, at most, only five days to be lost out of the *180 days* in which a plaintiff may file a complaint under the FOIA.

Examining the worst-case scenario demonstrates this point. Suppose a public body receives a FOIA request, creates a written notice on the same day, and then does not respond until the fifth business day after the notice was created. In this situation, the final determination was made on the day that the notice was created and the plaintiff loses the five days that the public body held onto the notice. While the plaintiff loses the first *five days* of the limitations period, the plaintiff still has nearly *six months* to file her complaint. Thus, the scheme created by MCL 15.235(2) and MCL 15.235(3) acts as a safeguard to prevent undue shortening of the limitations period without the Court of Appeals' unsupported construction.

In this case, MSP made its final determination when it created a written notice denying Prins's request. Such notice was created on July 26, 2008. Since Prins failed to file suit within 180 days of MSP's final determination, the circuit court properly granted summary disposition to defendants. Accordingly, the judgment of the Court of Appeals should be reversed and summary judgment in favor of defendants reinstated.

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[9] *Id*.

[10] *Id*.

[11] MCL 15.235(3) also authorizes a circuit court to assess damages against the public body for a failure to comply with MCL 15.235(2).

PEOPLE v ANGELO JOHNSON, No. 143542; reported below: 293 Mich App 79.

PEOPLE v SCHWARZLOSE, No. 143693; Court of Appeals No. 298172.

DAVIDSON v DAVIDSON, No. 143742; Court of Appeals No. 298746.

PEOPLE v JOHN BENNETT, No. 143825; Court of Appeals No. 296140.
MARILYN KELLY, J., would grant leave to appeal.

In re APPORTIONMENT OF KENT COUNTY, No. 143989; Court of Appeals No. 304697.
HATHAWAY, J., would grant leave to appeal.

Reconsideration Denied January 25, 2012:

KHAN v CITY OF FLINT, No. 142324; Court of Appeals No. 293991. Summary disposition at 490 Mich 851.

Summary Disposition January 27, 2012:

PEOPLE v ANTHONY BROOKS, No. 143780; reported below: 293 Mich App 525. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate, as dicta, the portion of the judgment of the Court of Appeals that addressed the trial court's decision to upwardly depart from the sentencing guidelines. Because the Court of Appeals granted defendant a new trial, defendant's challenge to his sentence was rendered moot. The Court of Appeals' discussion of this issue also wrongly left the impression that a departure sentence of life may only be imposed on a habitual offender when the sentencing offense is murder or a class A felony. See MCL 769.12(1). We express no opinion, however, whether the extent of the trial court's sentencing departure was justified under *People v Smith*, 482 Mich 292 (2008). In all other respects, leave to appeal is denied.
MARILYN KELLY, J., would deny leave to appeal.

In re MAYS, No. 142566; Court of Appeals No. 297447. Leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we reverse the November 23, 2010, judgment of the Court of Appeals and the March 30, 2010, order of the Wayne Circuit Court terminating respondent father's parental rights, and remand this case to the Wayne Circuit Court, Family Division, for further proceedings not inconsistent with this order.

The trial court clearly erred in finding that respondent "failed to successfully complete and benefit from . . . parenting classes." To the contrary, respondent submitted his certificate of completion from his parenting classes to the trial court and the witness for the petitioner was satisfied that respondent completed that requirement. Moreover, several additional facts underpinning the statutory basis for termination were established on the basis of hearsay testimony. MCR 3.977(F)(1)(b) requires "legally admissible evidence" that the grounds for termination are established when the petitioner seeks to terminate parental rights

"on the basis of one or more circumstances new or different from the offense that led the court to take jurisdiction," as petitioner acknowledges was the case with respect to respondent's termination proceeding. For these reasons, the trial court clearly erred in concluding that a statutory basis existed for termination of respondent's parental rights. Accordingly, we reverse that part of the Court of Appeals' judgment holding that the trial court did not clearly err in finding that a statutory basis existed for termination of respondent's parental rights.

We also reverse that part of the Court of Appeals' judgment holding that the trial court did not clearly err in finding that termination was in the children's best interests. MCL 712A.19b(5). The factual record in this case is inadequate to make a best-interest determination. In particular, there is no evidence in the record that the trial court considered whether termination of the respondent's parental rights was appropriate given the children's placement with their maternal grandmother. *In re Mason*, 486 Mich 142, 164 (2010).

Because respondent's appeal in the Court of Appeals only questioned the trial court's findings that the statutory grounds for termination existed and that termination was in the best interests of the children, we do not reach respondent's claim before this Court that the "one-parent doctrine," as articulated in *In re CR*, 250 Mich App 285 (2001), violates his "fundamental liberty interest . . . in the care, custody, and management of [his] child[ren]." *Santosky v Kramer*, 455 US 745, 753 (1982).[1] For this reason, we also do not reach respondent's claim of error regarding the sufficiency of the permanency planning hearing, MCL 712A.19a. We do not retain jurisdiction.

HATHAWAY, J., concurred in the result only.

MARILYN KELLY, J. I strongly believe that in deciding this case the Court should have reached the issue of whether the "one parent doctrine" should be upheld. The "one parent doctrine" derives from the 2002 Court of Appeals' decision in *In re CR*.[1] It allows the state to take jurisdiction over abused or neglected children on the basis of the actions of only one parent.

In re CR stated, "[O]nce the family court acquires jurisdiction over the children, MCR 5.973(A)[2] authorizes the family court to hold a

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[1] The constitutionality of the "one parent doctrine" is obviously a jurisprudentially significant issue and one which this Court will undoubtedly soon be required to address given the widespread application of this doctrine. Respondent's failure to preserve this challenge in the trial court or the Court of Appeals illustrates the need to raise this issue in a timely fashion. See *In re Hatcher*, 443 Mich 426 (1993). At any rate, respondent will have the continuing opportunity to raise this issue on remand. MCL 712A.19; MCL 712A.21.

[1] *In re CR*, 250 Mich App 185, 202 (2002).

[2] MCR 5.973(A) is now MCR 3.973(A). The *In re CR* Court noted, 250 Mich App at 202 n 35, that this rule has a statutory corollary in MCL 712A.6, which provides:

dispositional hearing 'to determine measures to be taken . . . against any adult . . .' "[3] The Court further opined that "the court rules simply do not place a burden on a petitioner . . . to file a petition and sustain the burden of proof at an adjudication with respect to every parent of the children involved in a protective proceeding before the family court can act in its dispositional capacity."[4]

The "one parent doctrine" was used in this case. Mays, the children's mother, left them home alone late into the night. Phillips, the children's father, did not live in the house or contribute to the neglect. Despite this, the trial court took jurisdiction over the children and placed both the mother and the father on a treatment plan. However, the state never determined that Phillips was an unfit parent, identified anything he did wrong, or stated what failures on his part the treatment plan was intended to fix. Nevertheless, when Phillips did not fully comply with the plan, the court terminated his parental rights.

There are many issues in this case. But the elephant in the room is whether the court should ever have taken jurisdiction over the children and proceeded to termination without having determined that Phillips was an unfit parent. *In re CR* is not on point because it is factually distinguishable. The father in that case voluntarily availed himself of the court's jurisdiction. Because the court had jurisdiction over him, *In re CR* never addressed the constitutionality of the "one parent doctrine."[5]

The validity of this doctrine is a jurisprudentially significant issue. In this case alone Phillips, the National Association of Counsel for Children, the Prosecuting Attorneys Association of Michigan, the Center for Individual Rights, the Legal Services Association of Michigan, the Michigan State Planning Body for the Delivery of Legal Services to the Poor,

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> The court has jurisdiction over adults as provided in this chapter and as provided in chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082, and may make orders affecting adults as in the opinion of the court are necessary for the physical, mental, or moral well-being of a particular juvenile or juveniles under its jurisdiction. However, those orders shall be incidental to the jurisdiction of the court over the juvenile or juveniles.

[3] *In re CR*, 250 Mich App at 202 (emphasis added).

[4] *Id*. at 205.

[5] *Troxel v Granville*, 530 US 57, 68 (2000), recognized "a presumption that fit parents act in the best interests of their children." In Justice Thomas's concurring opinion, he explained that he agreed with the plurality that the Court had recognized a fundamental right of parents to direct the upbringing of their children. See *id*. at 80 (Thomas, J., concurring). *Santosky v Kramer*, 455 US 745, 752-754 & n 7 (1982), held that the rights of minor children and parents are protected by the Due Process Clause of the Fourteenth Amendment.

the American Civil Liberties Union Fund of Michigan, and the Family Law Section of the State Bar of Michigan have urged us to address it.

Because the issue of the constitutionality of the "one parent doctrine" is significant and central to this case, I believe the Court should not conclude the case without addressing it.

MARKMAN, J. (*dissenting*). I respectfully dissent from the orders reversing both the Court of Appeals' and the trial court's decisions to terminate respondents' parental rights and I would vacate this Court's March 23, 2011, orders, 489 Mich 857 (2011), and deny leave to appeal. I am persuaded that the proceedings here were fair and in accordance with the law, and that the trial court exercised reasonable judgment in concluding that grounds existed for termination, and that termination was in the "best interests" of the children.

Considerable efforts were undertaken to reunify respondents with their children, although these efforts clearly failed. Respondent Mays failed to successfully complete and benefit from counseling and parenting classes, and further failed to maintain legal employment. Respondent Phillips failed to successfully complete and benefit from counseling and further failed to maintain adequate shelter or legal employment. Additionally, Phillips testified that he has never expressed any desire for the children to come live with him and that the children were better off living with their grandmother. Two review hearings were then held, with Mays choosing not to attend either hearing and Phillips attending only one. Under these circumstances, I cannot say that the trial court "clearly erred" by finding that respondents have "fail[ed] to provide proper care or custody for the child[ren] and there is no reasonable expectation that [they] will be able to provide proper care and custody within a reasonable time . . . ." MCL 712A.19b(3)(g).

I also do not believe that the trial court "clearly erred" by concluding that termination of respondents' parental rights was in the children's "best interests" because "neither parent is prepared to have the children placed in their care and neither is engaged in preparing themselves to parent the children on a full time basis." The majority does not dispute this conclusion, but asserts that the record is "inadequate to make a best interests determination." Again, I respectfully disagree. There is no specific formula, and there are no delimited factors that a court must consider when making a "best interest" determination. Rather, the trial court "may consider evidence introduced by any party," *In re Trejo Minors*, 462 Mich 341, 353 (2000), and if no "best interest" evidence is offered, the court may enter a finding "from evidence on the whole record . . . ." The record here, which included hearings, reports, and testimony, was more than sufficient, in my opinion, to allow the court to make a thoughtful and reasoned "best interest" determination. In particular, the majority faults the court for not considering the children's placement with a relative. However, the proposition that a court must *always* consider placement with a relative before termination, even after grounds for termination have been established and "best interest" findings made, lacks grounding in the law, which contains no specific factors that a court must invariably consider in deciding a termination case. Rather, what is required is a case-by-case determination in accor-

dance with the law, and that has occurred. While placement with a relative may in many instances constitute a relevant consideration in the "best interest" determination, the failure to consider it in a particular case does not necessarily preclude the court from determining that termination is in the children's "best interests." The primary beneficiary of the "best interest" determination is the child, *id.* at 356, and when the children's best interests are clearly served by the termination of rights, the fact that they are then living with a relative does not in every instance undermine that determination.

In re MAYS, No. 142568; Court of Appeals No. 297446. Leave to appeal having been granted, and the briefs and oral arguments of the parties having been considered by the Court, we affirm in part and reverse in part the November 23, 2010, judgment of the Court of Appeals and the March 30, 2010, order of the Wayne Circuit Court terminating respondent mother's parental rights, and remand this case to the Wayne Circuit Court, Family Division, for further proceedings not inconsistent with this order.

We affirm that part of the Court of Appeals' judgment holding that the trial court did not clearly err in finding that clear and convincing evidence was presented to support termination under at least one of the statutory grounds alleged. MCL 712A.19b(3).

We reverse that part of the Court of Appeals' judgment holding that the trial court did not clearly err in finding that termination was in the children's best interests. MCL 712A.19b(5). The factual record in this case is inadequate to make a best interests determination. In particular, there is no evidence in the record that the trial court considered whether termination of the respondent's parental rights was appropriate given the children's placement with their maternal grandmother. *In re Mason*, 486 Mich 142, 164 (2010).

Because respondent's appeal in the Court of Appeals only questioned the trial court's findings that the statutory grounds for termination existed and that termination was in the best interests of the children, we do not reach respondent's claim of error regarding the sufficiency of the permanency planning hearing, MCL 712A.19a. We do not retain jurisdiction.

HATHAWAY, J., concurred in the result only.

MARKMAN, J. (*dissenting*). I respectfully dissent from the orders reversing both the Court of Appeals' and the trial court's decisions to terminate respondents' parental rights and I would vacate this Court's March 23, 2011, orders, 489 Mich 857 (2011), and deny leave to appeal. I am persuaded that the proceedings here were fair and in accordance with the law, and that the trial court exercised reasonable judgment in concluding that grounds existed for termination, and that termination was in the "best interests" of the children.

Considerable efforts were undertaken to reunify respondents with their children, although these efforts clearly failed. Respondent Mays failed to successfully complete and benefit from counseling and parenting classes, and further failed to maintain legal employment. Respondent Phillips failed to successfully complete and benefit from counseling and further failed to maintain adequate shelter or legal employment. Additionally, Phillips testified that he has never expressed any desire for the

children to come live with him and that the children were better off living with their grandmother. Two review hearings were then held, with Mays choosing not to attend either hearing and Phillips attending only one. Under these circumstances, I cannot say that the trial court "clearly erred" by finding that respondents have "fail[ed] to provide proper care or custody for the child[ren] and there is no reasonable expectation that [they] will be able to provide proper care and custody within a reasonable time . . . ." MCL 712A.19b(3)(g).

I also do not believe that the trial court "clearly erred" by concluding that termination of respondents' parental rights was in the children's "best interests" because "neither parent is prepared to have the children placed in their care and neither is engaged in preparing themselves to parent the children on a full time basis." The majority does not dispute this conclusion, but asserts that the record is "inadequate to make a best interests determination." Again, I respectfully disagree. There is no specific formula, and there are no delimited factors that a court must consider when making a "best interest" determination. Rather, the trial court "may consider evidence introduced by any party," *In re Trejo Minors*, 462 Mich 341, 353 (2000), and if no "best interest" evidence is offered, the court may enter a finding "from evidence on the whole record . . . ." The record here, which included hearings, reports, and testimony, was more than sufficient, in my opinion, to allow the court to make a thoughtful and reasoned "best interest" determination. In particular, the majority faults the court for not considering the children's placement with a relative. However, the proposition that a court must *always* consider placement with a relative before termination, even after grounds for termination have been established and "best interest" findings made, lacks grounding in the law, which contains no specific factors that a court must invariably consider in deciding a termination case. Rather, what is required is a case-by-case determination in accordance with the law, and that has occurred. While placement with a relative may in many instances constitute a relevant consideration in the "best interest" determination, the failure to consider it in a particular case does not necessarily preclude the court from determining that termination is in the children's "best interests." The primary beneficiary of the "best interest" determination is the child, *id.* at 356, and when the children's best interests are clearly served by the termination of rights, the fact that they are then living with a relative does not in every instance undermine that determination.

Order Granting Oral Argument in Case Pending on Application for Leave to Appeal Entered January 27, 2012:

PEOPLE v KIYOSHK, No. 143469; Court of Appeals No. 295552. At oral argument, the parties shall address whether the defendant waived family court jurisdiction by pleading guilty to a specified juvenile violation under MCL 712A.2(a)(1). The parties may file supplemental briefs within 42 days of the date of this order, but they should not submit mere restatements of their application papers.

MARILYN KELLY, J. I would explicitly direct the parties to brief the issue

of whether the alleged jurisdictional defect in this matter involves a question of subject-matter jurisdiction or personal jurisdiction. Whether it is even *possible* for a defendant to waive family court jurisdiction depends on how this question is answered. Hence, we cannot reach the issue specified in today's order—whether the defendant in this case *did in fact* waive family court jurisdiction—until this threshold question is answered.

Unfortunately, today's order appears to simply presume that defendant could have waived family court jurisdiction. Because I would not make such a presumption, I would direct the parties to brief this issue.

Leave to Appeal Denied January 27, 2012:

In re SAH, No. 144178; Court of Appeals No. 302809.

In re KIVEL, No. 144322; Court of Appeals No. 304194.

Order Entered January 27, 2012:

In re EXECUTIVE MESSAGE OF THE GOVERNOR (BROWN V GOVERNOR), No. 143563. The motion for leave to file a brief amicus curiae is granted. The Executive Message remains under consideration.

CAVANAGH and MARILYN KELLY, JJ., would decline the request for certification of the Executive Message.

MARKMAN, J. (*dissenting*). I respectfully dissent. I do not know what the majority intends when it states that "[t]he Executive Message remains under consideration." "Under consideration" for what? "Under consideration" until when? A lawsuit was filed in the Ingham Circuit Court in June of last year; the Governor then filed an Executive Message in August requesting that this Court direct the circuit court to "certify" certain constitutional questions for the consideration of this Court; briefs were filed in support of, and in opposition to, such certification; this Court then directed the parties to file briefs addressing the substantive questions raised by the Executive Message; and, in December of last year, the parties filed such briefs. What then requires that this matter "remain under consideration"?

If, as plaintiffs believe, the Local Government and School District Fiscal Accountability Act, 2011 PA 4, authorizing emergency managers, is in violation of as many as nine provisions of our Constitution, implicating what plaintiffs view as our "citizens' inherent right to vote for local officials," it seems imperative to me that all or part of this law be enjoined as soon as possible. If, on the other hand, as defendants believe, the act is not only constitutional, but essential in maintaining the "financial integrity" of the state and its localities, it again seems imperative to me that the authority conferred by the act be affirmed as soon as possible. In either case, it is time that this case no longer "remain under consideration" but be "considered and resolved."

Furthermore, just as I have previously argued that this Court owes an obligation of comity to federal courts seeking to invoke our authority to certify questions of Michigan law, *In re Certified Question from the*

United States Court of Appeals for the Sixth Circuit, 472 Mich 1225, 1231 (2005) (MARKMAN, J., dissenting), I also believe that we owe an obligation of comity to the chief executive authority of this state when it seeks to invoke our authority to certify questions of Michigan law in order to expedite the consideration of a case by showing that the case involves a "controlling question of public law, and the question is of such public moment as to require early determination . . . ." MCR 7.305(A)(1). The certification of federal questions ensures that the most significant issues of Michigan law are decided by Michigan courts, and the certification of state questions ensures that such questions will be resolved by the state's highest court in as expeditious a manner as possible.

Because I believe that the constitutional questions identified in this case satisfy the certification requirements of MCR 7.305(A)(1), I would grant the request to certify and schedule oral arguments so that these questions can be resolved as soon as reasonably possible.

Summary Disposition January 30, 2012:

MITCHELL V STATE EMPLOYEES' RETIREMENT SYSTEM, No. 141909; Court of Appeals No. 289577. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the State Employees' Retirement Board for reconsideration of the petitioner's claim for benefits in light of *Nason v State Employees' Retirement Sys*, 290 Mich App 416 (2010).

MCGEE V CITY OF WARREN, No. 143337; Court of Appeals No. 296452. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate in part the judgment of the Court of Appeals and we remand this case to the Court of Appeals to apply MCL 600.5807(8) to the city of Warren's claims for breach of contract (insofar as they do not seek indemnity for damages sustained as a result of tortious injury) and, if necessary, for consideration of the remaining issues raised in the appeal. MCL 600.5839(1) bars any action against a contractor seeking indemnity for damages resulting from bodily injury arising out of a defective and unsafe condition of an improvement to real property. *Miller-Davis v Ahrens Constr, Inc*, 489 Mich 355 (2011). However, the statute of repose does not apply to nonindemnity actions for breach of contract.

PEOPLE V LACKEY , No. 143758; Court of Appeals No. 304761. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Saginaw Circuit Court for a determination whether the defendant received good-time credit from the county sheriff under MCL 51.282(2) when he was incarcerated in 2009. If the trial court determines that the defendant was awarded good-time credit, the court shall amend the judgment of sentence by crediting the defendant's sentence with the number of good-time days he was awarded, and forward a copy of the amended judgment of sentence to the Department of Corrections. See *People v Milbank*, 471 Mich 910 (2004), and *People v Resler*, 210 Mich App 24 (1995). The court shall also determine whether the defendant was awarded credit for "trustee days," and whether his sentence should be

credited for those days as well. In all other respects, leave to appeal is denied. We do not retain jurisdiction.

RICHARD v SCHNEIDERMAN & SHERMAN, PC, Nos. 143836 and 143839; reported below: 294 Mich App 37. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *Residential Funding Co, LLC v Saurman*, 490 Mich 909 (2011).

MARILYN KELLY, J., would grant leave to appeal.

In re PAROLE OF TODD, No. 143838; Court of Appeals No. 299967. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the judgment of the Court of Appeals and we remand this case to the Court of Appeals for reconsideration in light of *In re Parole of Elias*, 294 Mich App 507 (2011). We do not retain jurisdiction.

Leave to Appeal Denied January 30, 2012:

RUFFIN v AUTO CLUB INSURANCE COMPANY, No. 142630; Court of Appeals No. 292687.

HATHAWAY, J., would grant leave to appeal.

AWADA v CITY OF MELVINDALE, No. 142730; Court of Appeals No. 293564.

PEOPLE v HUGO RODRIGUEZ, No. 143006; Court of Appeals No. 301922.

PEOPLE v GEORGE, No. 143022; Court of Appeals No. 298628.

INGRAHAM v PERRONE, No. 143161; Court of Appeals No. 296224.

PEOPLE v JERMAINE HUNTER, No. 143223; Court of Appeals No. 303887.

PB REIT, INC v DEBABNEH, No. 143308; Court of Appeals No. 302909.

HATHAWAY, J., would grant leave to appeal.

DAVIS v ASSOCIATED COMMUNITY SERVICES, No. 143331; Court of Appeals No. 300440.

PEOPLE v MYRON JACKSON, No. 143474; Court of Appeals No. 299964.

PEOPLE v SOULE, No. 143485; Court of Appeals No. 300205.

PEOPLE v WAYNE CARTER, No. 143489; Court of Appeals No. 303833.

PEOPLE v NEAL, No. 143490; Court of Appeals No. 299316.

PEOPLE v LANIER, No. 143545; Court of Appeals No. 295314.

In re REVIEW OF CONSUMERS ENERGY COMPANY RENEWABLE ENERGY PLAN, No. 143613; reported below: 293 Mich App 254.

PEOPLE v JOSEPH JACKSON, No. 143622; Court of Appeals No. 303573.

PEOPLE v MATTHEWS, No. 143636; Court of Appeals No. 303981.

PEOPLE v CRAIG JONES, No. 143641; Court of Appeals No. 302579.

PEOPLE v BUKOWSKI, No. 143669; Court of Appeals No. 293011.

PEOPLE v CLINTON, No. 143698; Court of Appeals No. 300902.

PEOPLE v STRICKLAND, No. 143715; reported below: 293 Mich App 393.

DITTMER v DEPARTMENT OF CORRECTIONS, No. 143720; Court of Appeals No. 298997.

HOWERY v CITY OF DETROIT, No. 143761; Court of Appeals No. 302703.

WAYNE COUNTY TREASURER v HOWERY, No. 143763; Court of Appeals No. 303928.

PEOPLE v JIMMIE JONES, No. 143791; Court of Appeals No. 305101.

BRADLEY-PARSONS v VANDERROEST, No. 143796; Court of Appeals No. 301530.

GRIEVANCE ADMINISTRATOR v MACDONALD, No. 143799.

HOWERY v CITY OF DETROIT, No. 143804; Court of Appeals No. 303958.

PEOPLE v ARCHEY, No. 143835; Court of Appeals No. 296757.

PEOPLE v OMAR JOHNSON, No. 143840; Court of Appeals No. 305416.

HOWERY v WAYNE COUNTY, No. 143845; Court of Appeals No. 304289.

PEOPLE v STERLING, No. 143853; Court of Appeals No. 304443.

PEOPLE v STEVEN SCOTT, No. 143863; Court of Appeals No. 298902.

PEOPLE v REGINALD WILLIAMS, No. 143867; Court of Appeals No. 305285.

PEOPLE v MCHENRY, No. 143868; Court of Appeals No. 305836.

In re GUARDIANSHIP OF PERNIKOFF, No. 143870; Court of Appeals No. 304351.

PEOPLE v RAHEIM REID, No. 143873; Court of Appeals No. 305012.

CIVILS v DEPARTMENT OF INFORMATION AND TECHNOLOGY, No. 143877; Court of Appeals No. 303367.
HATHAWAY, J., would grant leave to appeal.

YOUMANS v BWA PROPERTIES, No. 143880; Court of Appeals No. 297275.

In re HOWERY ESTATE, No. 143884; Court of Appeals No. 304473.

PEOPLE v ABBOTT, No. 143886; Court of Appeals No. 304701.

PEOPLE v ALONZO, No. 143889; Court of Appeals No. 304491.

PEOPLE v DELGADO, No. 143907; Court of Appeals No. 304932.

PEOPLE v SEARS, No. 143919; Court of Appeals No. 305806.

PEOPLE v HAYES, No. 143923; Court of Appeals No. 297660.

PEOPLE v KALISHA RIVERA, No. 143924; Court of Appeals No. 305520.

PEOPLE v GREER, No. 143929; Court of Appeals No. 305669.

PEOPLE v HASLETT, No. 143983; Court of Appeals No. 298528.

PEOPLE v KENDRICK LEE, No. 143984; Court of Appeals No. 305695.

PEOPLE v ALANTAE JONES, No. 143985; Court of Appeals No. 305204.

PEOPLE v GALVAN, No. 144256; Court of Appeals No. 299814.

Reconsideration Denied January 30, 2012:

PEOPLE v ANTONIO VASQUEZ, No. 143351; Court of Appeals No. 297755. Leave to appeal denied at 490 Mich 893.

PEOPLE v SPENCER WILLIAMS, No. 143530; Court of Appeals No. 297732. Leave to appeal denied at 490 Mich 912.

PEOPLE v MARK WHITE, No. 143557; Court of Appeals No. 297914. Leave to appeal denied at 490 Mich 895.

PEOPLE v WARREN, No. 143569; Court of Appeals No. 304623. Leave to appeal denied at 490 Mich 913.

PEOPLE v SAWYER, No. 143571; Court of Appeals No. 296782. Leave to appeal denied at 490 Mich 913.

Summary Disposition February 1, 2012:

KOHLOFF v CHRYSLER GROUP, No. 143645; Court of Appeals No. 300801. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

PEOPLE v ROBERT TAYLOR, No. 143668; Court of Appeals No. 304372. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we vacate the sentence of the Kent Circuit Court, and we remand this case to the trial court for resentencing. The prosecutor acknowledged and the circuit court agreed that the defendant's sentencing guidelines were misscored and that the applicable guidelines range was lower than the one within which the defendant was originally sentenced. However, the defendant was not present when the trial court affirmed the previous sentence by articulating reasons for departing from the properly scored sentencing guidelines range. MCL 769.34(7); MCR 6.425(F)(4). We do not retain jurisdiction.

SHEPPARD v MEIJER GREAT LAKES LIMITED, No. 143778; Court of Appeals No. 300681. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we remand this case to the Court of Appeals for consideration as on leave granted.

In re KRUPA, No. 144108; Court of Appeals No. 302834. Pursuant to MCR 7.302(H)(1), in lieu of granting leave to appeal, we reverse the judgment of the Court of Appeals. The Court of Appeals misapplied the clear error standard by engaging in improper fact-finding and substituting its judgment for that of the trial court. MCR 3.977(K); MCR 2.613(C); *In re Miller*, 433 Mich 331 (1989). As a result, the Court of Appeals rendered a decision that was contrary to the clear and convincing evidence supporting the statutory grounds for termination under MCL 712A.19b(3)(g) and (j). We remand this case to the Court of Appeals for it to address the remaining issue raised by the respondent on direct appeal—whether the trial court erred in determining that termination of parental rights was in the children's best interests. MCL 712A.19b(5). We do not retain jurisdiction.

Leave to Appeal Granted February 1, 2012:

ADER v DELTA COLLEGE BOARD OF TRUSTEES, No. 143621; Court of Appeals No. 290583.

ILE v FOREMOST INSURANCE COMPANY, No. 143627; reported below: 293 Mich App 309. The parties shall include among the issues to be briefed whether the underinsured motorist coverage with limits of $20,000 per person and $40,000 per accident in the insurance policy issued by Foremost Insurance Company is illusory and, if so, what remedy is available to the plaintiffs.

PEOPLE v ZAJACZKOWSKI, No. 143736; reported below: 293 Mich App 370. The parties shall address whether the Court of Appeals erred by concluding that presumptions of legitimacy implied by statutory law, i.e., MCL 552.29, MCL 700.2114, and caselaw, and defendant's lack of standing under the Paternity Act, MCL 722.711 *et seq*., are relevant to whether a relationship by blood exists as that term is used in MCL 750.520b(1)(b)(*ii*).

We further order the Kent Circuit Court, in accordance with Administrative Order 2003-03, to determine whether the defendant is indigent and, if so, to appoint counsel to represent the defendant in this Court.

The Prosecuting Attorneys Association of Michigan, the Criminal Defense Attorneys of Michigan, and the Family Law Section of the State Bar of Michigan are invited to file briefs amicus curiae. Other persons or groups interested in the determination of the issues presented in this case may move the Court for permission to file briefs amicus curiae.

Leave to Appeal Denied February 1, 2012:

PEOPLE v HELLER, No. 143565; Court of Appeals No. 298375.

SMITH v SMITH, No. 143618; reported below: 292 Mich App 699.
MARILYN KELLY, J., would grant leave to appeal.

PEOPLE v LARIO-MUNOZ, No. 143625; Court of Appeals No. 295811.
MARILYN KELLY, J., would remand this case for resentencing.

WALCH v WALCH, No. 143667; Court of Appeals No. 296626.

ALLEN v AMERICAN GENERAL FINANCIAL SERVICES, INC, No. 143681; Court of Appeals No. 297392.

PEOPLE v STEVENSON, No. 143786; Court of Appeals No. 304210.

Reconsideration Denied February 1, 2012:

PEOPLE v WRIGHT, No. 143120; Court of Appeals No. 297192. Summary disposition at 490 Mich 868.
MARILYN KELLY, J., would grant reconsideration.

Leave to Appeal Denied Feburary 3, 2012:

MASON COUNTY v DEPARTMENT OF COMMUNITY HEALTH, No. 143721; reported below: 293 Mich App 462.

MARKMAN, J. (*dissenting*). I respectfully dissent, and would grant leave to appeal. Defendant West Michigan Community Mental Health System (WMCMHS) refused to make lease payments on buildings it leased from plaintiffs Mason and Oceana Counties because the Department of Community Health (DCH), which funds WMCMHS, considered the lease agreements not to be arm's-length transactions within the meaning of an Office of Management and Budget circular, with which a contract between WMCMHS and codefendant DCH requires compliance. The circuit court granted plaintiffs' motion for summary disposition, and in a published opinion, the Court of Appeals affirmed.

Codefendant DCH argues that the Court of Claims has exclusive jurisdiction in this case because plaintiffs' claims pertain to the state's contracts with WMCMHS and require state payments to WMCMHS. The Court of Claims has exclusive jurisdiction "[t]o hear and determine all claims and demands, liquidated and unliquidated, ex contractu and ex delicto, against the state and any of its departments, commissions, boards, institutions, arms, or agencies." MCL 600.6419(1). In *Parkwood Ltd Dividend Housing Ass'n v State Housing Dev Auth*, 468 Mich 763 (2003), we held that the Court of Claims has exclusive jurisdiction over a declaratory judgment action directly involving a state contract.

In this case, the circuit court held that it had jurisdiction because the witnesses are all "local individuals." The Court of Appeals affirmed because this is a "simple breach of contract [action] between two parties, . . . neither of which is a state agency," and stated:

> That breach of the contract between plaintiffs and WMCMHS occurred as a result of WMCMHS's contract with defendants. Not being parties to the contract between defendants and WMCMHS,

> however, plaintiffs have no rights under that contract and could not seek a declaratory ruling regarding the contract with the state at the Court of Claims. [*Mason Co v Dep't of Community Health*, 293 Mich App 462, 471-472 (2011)].

The concern I have with this analysis is that plaintiffs *did* also bring this cause of action against DCH, and the issue decided by the circuit court was whether WMCMHS would be breaching its contract with DCH if it made the lease payments to plaintiffs. Thus, the action was (a) brought against a state department and (b) involved the interpretation of a state contract. In order to avoid raising unnecessary confusion concerning the exclusive jurisdiction of the Court of Claims, I would grant leave to appeal.

In re MANUELL-PERALEZ, No. 144370; Court of Appeals No. 303938.

In re TREVINO, No. 144419; Court of Appeals No. 303170.

Reconsideration Denied February 3, 2012:

LEE V DETROIT MEDICAL CENTER, No. 144107; Court of Appeals No. 307164. Leave to appeal denied at 490 Mich 975.

SPECIAL ORDERS

SPECIAL ORDERS

In this section are orders of the Supreme Court
(other than orders entered in cases before the Court)
of general interest to the bench and bar of the state.

Orders Entered September 28, 2011:

PROPOSED AMENDMENT OF MCR 3.211.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.211 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing by the Court before a final decision is made. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended with new language indicated in underlining and deleted language is overstricken.]

RULE 3.211. JUDGMENTS AND ORDERS.

(A)-(C) [Unchanged.]

(D) Uniform Support Orders

(1) Any provisions regarding child support or spousal support must be prepared on the latest version of the Uniform Support Order drafted by the state court administrative office ~~and approved by the Supreme Court~~. This order must accompany any judgment or order affecting child support or spousal support, and both documents must be signed by the judge. If only child support or spousal support is ordered, then only the Uniform Support Order must be submitted to the court for entry. The Uniform Support Order shall govern if the terms of the judgment or order conflict with the Uniform Support Order.

(2) No judgment or order concerning a minor or a spouse shall be entered unless either:

(a) the final judgment or order incorporates by reference a Uniform Support Order, or

(b) the final judgment or order states that no Uniform Support Order is required because support is reserved or spousal support is not ordered.

(3) The clerk shall charge a single judgment entry fee when a Uniform Support Order is submitted for entry along with a judgment or order that incorporates it by reference.

(E)-(H) [Unchanged.]

Staff Comment: This proposed amendment would eliminate the requirement that the Supreme Court approve changes to the Uniform Support Order forms. Without explicit approval required by the Supreme Court, the forms would be updated like other forms that are revised on a regular basis within the State Court Administrative Office.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2004-55. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 6.005.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.005 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.mi.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 6.005. RIGHT TO ASSISTANCE OF LAWYER; ADVICE; APPOINTMENT FOR INDIGENTS; WAIVER; JOINT REPRESENTATION; GRAND JURY PROCEEDINGS.

(A)-(G) [Unchanged.]

(H) Scope of Trial Lawyer's Responsibilities. The responsibilities of the trial lawyer who represents the defendant include:

(1) representing the defendant in all trial court proceedings through initial sentencing,

(2) filing of interlocutory appeals the lawyer deems appropriate, and

(3) responding to any preconviction appeals by the prosecutor. The defendant's lawyer must either:

(i) file a substantive brief in response to a prosecutor's interlocutory application for leave to appeal, or

(ii) notify the Court of Appeals that the lawyer will not be filing a brief in response to the application.

(4) Unless an appellate lawyer has been appointed or retained, or if retained trial counsel withdraws, the trial lawyer who represents the defendant is responsible for filing postconviction motions the lawyer deems appropriate, including motions for new trial, for a directed verdict of acquittal, to withdraw plea, or for resentencing, and.

(5) when an appellate lawyer has been appointed or retained, promptly making the defendant's file, including all discovery material obtained, available for copying upon request of that lawyer. The trial lawyer must retain the materials in the defendant's file for at least five years after the case is disposed in the trial court.

(I) [Unchanged.]

Staff Comment: This proposed amendment would clarify that trial counsel is required to make a defendant's file available to an appellate lawyer, and would be required to retain the file for at least five years. This file was prompted by reports of appellate counsel having difficulty obtaining trial materials (especially video or audio materials that were not transcribed as part of the transcript). The five-year period mirrors the five-year retention period contained in MRPC 1.15(b)(2).

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by January 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-15. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 6.302.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 6.302 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.mi.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 6.302. PLEAS OF GUILTY AND NOLO CONTENDERE.

(A) Plea Requirements. The court may not accept a plea of guilty or nolo contendere unless it is convinced that the plea is understanding, voluntary, and accurate. Before accepting a plea of guilty or nolo contendere, the court must place the defendant or defendants under oath and personally carry out subrules (B)-(E).

(B) An Understanding Plea. Speaking directly to the defendant or defendants, the court must advise the defendant or defendants of the following and determine that each defendant understands:

(1) the name of the offense to which the defendant is pleading; the court is not obliged to explain the elements of the offense, or possible defenses;

(2) the maximum possible prison sentence for the offense and any mandatory minimum sentence required by law; further, the court shall advise the defendant that if the defendant has been previously convicted of a felony, the defendant may be charged as an habitual offender and the maximum possible sentence may be increased;

(3) if the plea is accepted, the defendant will not have a trial of any kind, and so gives up the rights the defendant would have at a trial, including the right:

(a) to be tried by a jury;

(b) to be presumed innocent until proved guilty;

(c) to have the prosecutor prove beyond a reasonable doubt that the defendant is guilty;

(d) to have the witnesses against the defendant appear at the trial;

(e) to question the witnesses against the defendant;

(f) to have the court order any witnesses the defendant has for the defense to appear at the trial;

(g) to remain silent during the trial;

(h) to not have that silence used against the defendant; and

(i) to testify at the trial if the defendant wants to testify.

(4) if the plea is accepted, the defendant will be giving up any claim that the plea was the result of promises or threats that were not disclosed to the court at the plea proceeding, or that it was not the defendant's own choice to enter the plea;

(5) any appeal from the conviction and sentence pursuant to the plea will be by application for leave to appeal and not by right;

The requirements of subrules (B)(3) and (B)(5) may be satisfied by a writing on a form approved by the State Court Administrative Office. If a court uses a writing, the court shall address the defendant and obtain from the defendant orally on the record a statement that the rights were read and understood and a waiver of those rights. The waiver may be obtained without repeating the individual rights.

(C)-(F) [Unchanged.]

Staff Comment: This proposed amendment of MCR 6.302 would reinsert a requirement that a court advise a defendant who pleads guilty that the defendant's maximum possible prison sentence may be longer than the maximum possible prison sentence for a particular offense if the defendant falls within the parameters of the habitual offender statute (MCL 769.13). The statute allows a prosecutor to notify the defendant that the prosecutor intends to seek an enhanced sentence after the defendant pleads guilty. Thus, the sentence range given by the court may not take into account any sentence enhancement at the plea hearing.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposals may be sent to the

Supreme Court Clerk in writing or electronically by January 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-20. Your comments and the comments of others will be posted at www.court.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered October 20, 2011:

PROPOSED AMENDMENT OF MCR 7.210.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.210 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended with new language indicated in underlining and deleted language is overstricken.]

RULE 7.210. RECORD ON APPEAL.

(A)-(B) [Unchanged.]

(C) Exhibits. ~~Within 21 days after the claim of appeal is filed, a party possessing any exhibits offered in evidence, whether admitted or not, shall file them with the trial court or tribunal clerk, unless by stipulation of the parties or order of the trial court or tribunal they are not to be sent, or copies, summaries, or excerpts are to be sent. Xerographic copies of exhibits may be filed in lieu of originals unless the trial court or tribunal orders otherwise. When the record is returned to the trial court or tribunal, the trial court or tribunal clerk shall return the exhibits to the parties who filed them.~~ The trial court or tribunal shall retain originals or legible copies of all documentary, photographic, video, or audio exhibits offered in evidence, whether admitted or not. If no claim of appeal has been filed upon expiration of the time for doing so, the trial court or tribunal may return such exhibits to the parties who offered them. By stipulation of the parties or order of the trial court or tribunal, exhibits in other forms may be returned to the parties who offered them. Appellants are entitled to access the exhibits or proposed exhibits that are not in documentary, photograph, video, or audio form upon a showing of good cause and the filing of a motion seeking such access within the time for filing appellant's brief on appeal. When the record is returned to the trial court or tribunal, the trial court or tribunal clerk shall return the exhibits to the parties who filed them.

(D)-(I) [Unchanged.]

Staff Comment: This amendment was proposed by James Neuhard, former director of the State Appellate Defender Office. The proposed amendment would require trial courts to become the depository for exhibits offered in evidence (whether those exhibits are admitted or not), instead of requiring parties to submit exhibits offered in evidence when a case is submitted to the Court of Appeals on a claim of appeal.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by February 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-25. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

Order Entered November 10, 2011:

PROPOSED AMENDMENTS OF MCR 7.210 AND MCR 7.212.

On order of the Court, this is to advise that the Court is considering amendment of Rule 7.210 and Rule 7.212 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/PH.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 7.210. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

(1) [Unchanged.]

(2) Transcript Unavailable. When a transcript of the proceedings in the trial court or tribunal cannot be obtained from the court reporter or recorder, the appellant shall take the following steps to settle the record and to cause the filing of a certified ~~file a~~ settled statement of facts to serve as a substitute for the transcript.

(a) No later than 56 days after the filing of the other transcripts, ~~Within 14 days after filing the claim of appeal,~~ the appellant shall file with the trial court or tribunal clerk, and serve on each appellee, a motion to settle the record and, where reasonably possible, a proposed statement

of facts. A ~~The~~ proposed statement of facts must concisely set forth the substance of the testimony, or the oral proceedings before the trial court or tribunal if no testimony was taken, in sufficient detail to ~~inform the Court of Appeals of the nature of the controversy and of the proceedings in the trial court or tribunal~~ provide for appellate review.

(b) The appellant shall notice the motion to settle the record for hearing ~~proposed statement of facts for prompt settlement~~ before the trial court or tribunal to be held within 21 days of the filing of the motion. If appellant filed a proposed statement of facts with the motion, appellee must file an ~~An~~ amendment or objection to the proposed statement of facts ~~must be in writing, filed~~ in the trial court or tribunal before the time set for the settlement hearing, and ~~served~~ serve it on the appellant and any other appellee, or the trial court shall adopt and file appellant's proposed statement of facts as the certified settled statement of facts.

(c) The trial court or tribunal shall settle any controversy and certify a settled statement of facts as an accurate, fair, and complete statement of the proceedings before it. The certified settled statement of facts must concisely set forth the substance of the testimony, or the oral proceedings before the trial court or tribunal if no testimony was taken, in sufficient detail to provide for appellate review.

(d) The settled statement of facts and the certifying order must be filed with the trial court or tribunal clerk and a copy of the ~~certifying order~~ same must be filed with the Court of Appeals.

(3) [Unchanged.]

(C)-(I) [Unchanged.]

RULE 7.212. BRIEFS.

(A) Time for Filing and Service.

(1) Appellant's Brief.

(a) Filing. The appellant shall file 5 typewritten, xerographic, or printed copies of a brief with the Court of Appeals within

(i) 28 days after the claim of appeal is filed, the order granting leave is certified, or the transcript is filed with the trial court, whichever is later, in a child custody case or an interlocutory criminal appeal. This time may be extended only by the Court of Appeals on motion; or

(ii) the time provided by MCR 7.208(B)(5)(a), 7.208(B)(6), or 7.211(C)(1), in a case in which one of those rules applies;

(iii) 56 days after the claim of appeal is filed, the order granting leave is certified, ~~or~~ the transcript is filed with the trial court or tribunal, or a settled statement of facts and certifying order is filed with the trial court or tribunal, whichever is later, in all other cases. In a criminal case in which substitute counsel is appointed for the defendant, the time runs from the date substitute counsel is appointed, ~~or~~ the transcript is filed, or a settled statement of facts and certifying order is filed, whichever is later. The parties may extend the time within which the brief must be filed for 28 days by signed stipulation filed with the Court of Appeals. The Court of Appeals may extend the time on motion.

(b) [Unchanged.]

(2)-(5) [Unchanged.]

(B)-(I) [Unchanged.]

Staff Comment: The proposed amendments of MCR 7.210 and MCR 7.212 would extend the time period in which parties may request that a court settle a record for which a transcript is not available and would clarify the procedure for doing so.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-26. Your comments and the comments of others will be posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed.

Order Entered November 28, 2011:

PROPOSED ALTERNATIVE AMENDMENTS OF THE CODE OF JUDICIAL CONDUCT.

On order of the Court, this is to advise that the Court is considering alternative amendments of various canons of the Code of Judicial Conduct. Before determining whether either alternative proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

ALTERNATIVE A

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. A judge must expect to be the subject of constant public scrutiny. A judge must therefore accept restrictions on conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

B. A judge should respect and observe the law. At all times, the conduct and manner of a judge should promote public confidence in the integrity and impartiality of the judiciary. Without regard to a person's

race, gender, or other protected personal characteristic, a judge should treat every person fairly, with courtesy and respect.

C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others, but participation in activities allowed in Canon 4 is not a violation of this principle.

D. A judge should not appear as a witness in a court proceeding unless subpoenaed.

~~D.~~E. A judge may respond to requests for personal references.

~~E.~~F. A judge should not allow activity as a member of an organization to cast doubt on the judge's ability to perform the function of the office in a manner consistent with the Michigan Code of Judicial Conduct, the laws of this state, and the Michigan and United States Constitutions. A judge should be particularly cautious with regard to membership activities that discriminate, or appear to discriminate, on the basis of race, gender, or other protected personal characteristic. Nothing in this paragraph should be interpreted to diminish a judge's right to the free exercise of religion.

G. No judge or other person, party, committee, organization, firm, group, or entity may accept any contribution of money, directly or indirectly, to or for a judge's benefit for any purpose whatever, including but not limited to, contributions for a campaign deficit, expenses associated with judicial office, a testimonial, an honorarium (other than for services, subject to Canon 5) or otherwise.

Canon 4. A Judge May Engage in Extrajudicial Activities ~~to Improve the Law, the Legal System, and the Administration of Justice~~

As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the administration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that time permits, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the improvement of the law. A judge should regulate extrajudicial activities to minimize the risk of conflict with judicial duties.

A judge~~, subject to the proper performance of judicial duties,~~ may engage in the following ~~quasi-judicial~~ activities:

A. Law-Related Activities.

A.(1) A judge may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

~~B.~~(2) A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and may otherwise consult with such executive or legislative body or official on such matters.

~~C.~~(3) A judge may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the

law, the legal system, or the administration of justice. A judge ~~may assist such an organization in raising funds and~~ may participate in the ~~their~~ management and investment of such an organization's funds~~, but should not individually solicit funds~~.

(4) A judge may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the administration of justice.

~~Canon 5. A Judge Should Regulate Extra-Judicial Activities to Minimize the Risk of Conflict with Judicial Duties~~

~~(A)~~B. Avocational Activities. A judge may write, lecture, teach, speak, and consult on nonlegal subjects, appear before public nonlegal bodies, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of the office or interfere with the performance of judicial duties.

~~B.~~C. Civic and Charitable Activities. A judge may participate in civic and charitable activities that do not reflect adversely upon the judge's impartiality or interfere with the performance of judicial duties. A judge may serve and be listed as an officer, director, trustee, or nonlegal advisor of a bona fide educational, religious, charitable, fraternal, or civic organization~~, subject to the following limitations: (1)~~. A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before the judge or will be regularly engaged in adversary proceedings in any court.

~~(2) A judge should not individually solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of the office for that purpose, but may be listed as an officer, director, or trustee of such an organization. A judge may, however, join a general appeal on behalf of an educational, religious, charitable, or fraternal organization, or speak on behalf of such organization.~~

D. Fundraising Activities. A judge should not individually solicit funds for any educational, religious, charitable, fraternal, or civic organization or any organization or governmental agency devoted to the improvement of the law, the legal system, or the administration of justice or use or permit the use of the prestige of the office for that purpose. A judge may, however, serve as a member of an honorary committee or may join a general appeal on behalf of such an organization. A judge may speak on behalf of such an organization and may speak at or receive an award or other recognition in connection with an event of such an organization. A judge may allow his or her name or title to be used in advertising an event of such an organization that is not a fundraising event. A judge may not allow the judge's name or title to be used in advertising the event if it is a fundraising event, unless the judge's public participation is limited to serving only as a member of an honorary committee or joining a general appeal on behalf of the organization.

~~C.~~E. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality or judicial office, interfere with the proper performance of judicial duties, exploit the

judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

(2) Subject to the requirements of ~~C~~E(1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as director, officer, manager, advisor, or employee of any business. Provided, however, with respect to a judge holding office and serving as an officer, director, manager, advisor, or employee of any business not prohibited heretofore by law or judicial canon, the effective date of the prohibition contained herein shall be the date of expiration of the judge's current judicial term of office.

(3) A judge should manage investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as it can be done without serious financial detriment, the judge should dispose of investments and other financial interests that require frequent disqualification.

(4) Neither a judge nor a family member residing in the judge's household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) A judge may accept a gift or gifts not to exceed a total value of $100, incident to a public testimonial; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.

(b) A judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants.

(c) A judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and, if its value exceeds $100, the judge reports it in the same manner as compensation is reported in Canon 6~~5~~C.

(5) For the purposes of this section, "family member residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a family member, who resides in the judge's household.

(6) A judge is not required by this code to disclose income, debts, or investments, except as provided in this canon and Canons 3 and 6~~5~~.

(7) Information acquired by a judge in a judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties.

~~D.~~F. Fiduciary Activities. A judge should not serve as an executor, administrator, testamentary trustee, or guardian, except for the estate, testamentary trust, or person of a member of the judge's immediate family, and then only if such service will not interfere with the proper performance of judicial duties. As a family fiduciary, a judge is subject to the following restrictions:

(1) A judge should not serve if it is likely that as such fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as such fiduciary, a judge is subject to the same restrictions on financial activities that apply in the judge's personal capacity.

~~E.~~G. Arbitration. A judge should not act as an arbitrator or mediator, except in the performance of judicial duties.

~~F.~~H. Practice of Law. A judge should not practice law for compensation except as otherwise provided by law.

~~G.~~I. Extra-~~J~~judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent the country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

Canon ~~6~~5. [Renumbered, but otherwise unchanged.]

Canon ~~7~~6. A Judge or a Candidate for Judicial Office Should Refrain from Political Activity Inappropriate to Judicial Office

A. Political Conduct in General.

(1) A judge or a candidate for judicial office should not:

(a) hold any office in a political party;

(b) make speeches on behalf of a political party or nonjudicial candidate or publicly endorse a candidate for nonjudicial office.

(2) A judge or candidate for judicial office may:

(a) attend political gatherings;

(b) speak to such gatherings on the judge's own behalf or on behalf of other judicial candidates;

(c) contribute to a political party.

(3) A judge should resign the judicial office before becoming a candidate either in a party primary or in a general election for nonjudicial office.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office:

(a) should maintain the dignity appropriate to judicial office, and should encourage family members to adhere to the same standards of political conduct that apply to the judge;

(b) should prohibit public employees subject to the judge's direction or control from doing for the judge what the judge is prohibited from doing under this canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office;

(d) should not knowingly, or with reckless disregard, use or participate in the use of any form of public communication that is false.

(2) These provisions govern a candidate, including an incumbent judge, for a judicial office:

(a) A candidate should not personally solicit or accept campaign funds, or solicit publicly stated support by improper use of the judicial office in violation of B(1)(c). A candidate may send a thank-you note to a contributor.

(b) A candidate may establish committees of responsible persons to secure and manage the expenditure of funds for the campaign and to obtain public statements of support for the candidacy.

(c) Such committees are prohibited from soliciting campaign contributions from lawyers in excess of $100 per lawyer, but may solicit public support from lawyers. It is not a violation of this provision for a committee, in undertaking solicitations that are not directed exclusively to lawyers but may in fact go to lawyers who are members of a group or found on a mailing list, to solicit more than $100 per person, provided that the following disclaimer appears on the letter or on a response card, in print that is at least the same size as the remainder of the print in the letter or the response card:

"Canon ~~7~~6 of the Michigan Code of Judicial Conduct prohibits a judicial campaign committee from soliciting more than $100 per lawyer. If you are a lawyer, please regard this as informative and not a solicitation for more than $100."

(d) A candidate's committee may not directly or indirectly accept funds from any committee that was established in connection with the candidate's attempt to secure any other judicial or nonjudicial office. The committee may solicit funds for the campaign no earlier than February 15 of the year of the election, and may not solicit or accept funds after the date of the general election.

(e) A candidate should not use or permit the use of campaign contributions for the private benefit of the candidate or the candidate's family.

(f) If a candidate is not opposed for such judicial office, the candidate or the candidate's committee shall return to the contributors funds raised in excess of the actual costs incurred or contribute such funds to the client security fund of the State Bar of Michigan, not later than January 1 following the election. Likewise, any candidate or committee having funds remaining after payment of all campaign expenses shall either return such funds to the contributors thereof or donate the funds to the client security fund of the State Bar of Michigan, not later than January 1 following the election.

(g) A candidate for judicial office may not pay an endorsing organization for its ranking or endorsement. However, a candidate for judicial office may contribute campaign funds to pay some of the costs associated with the publication of the endorsement or ranking of the candidate, provided the candidate secures from the endorsing organization an assurance, before the endorsement or ranking is made, that the endorsing organization will not:

(i) demand payment from the candidate or the candidate's agent as a condition of the endorsement or favorable ranking,

(ii) seek any assurance from the candidate before the endorsement or ranking is made that it will be paid if it endorses or ranks the candidate favorably,

(iii) add an endorsement or favorable ranking of a different candidate in the event that the initially supported candidate decides not to pay the endorsing organization for publicizing its endorsement and favorable ranking,

(iv) prevent the candidate from publicizing the endorsement or favorable ranking independent of the endorsing organization, regardless of whether the endorsing organization itself publicizes its endorsement or favorable ranking.

(3) No judge should personally sell or permit any court or public employee working for or assigned to any court to sell fundraising tickets or accept contributions of any kind on the judge's behalf or on behalf of any other judicial candidate.

~~C. Fund Raising Other Than for Campaign Purposes Prohibited. Except as provided in 7B(2)(b), (c),~~

~~(1) No judge shall accept a testimonial occasion on the judge's behalf where the tickets are priced to cover more than the reasonable costs thereof, which may include only a nominal gift,\so~~

~~(2) No judge or other person, party, committee, organization, firm, group or entity may accept any contribution of money or of a tangible thing of value, directly or indirectly, to or for a judge's benefit for any purpose whatever, including but not limited to, contribution for a campaign deficit, expenses associated with judicial office, testimonial, honorarium (other than for services, subject to Canon 6) or otherwise.~~

~~D.~~C. Applicability.

(1) A successful candidate, whether or not an incumbent, and an unsuccessful candidate who is a judge, are subject to judicial discipline for campaign misconduct. An unsuccessful candidate who is a lawyer is subject to lawyer discipline for judicial campaign misconduct.

(2) A successful elected candidate who was not an incumbent has until midnight December 31 following the election to wind up the candidate's law practice, and has until June 30 following the election to resign from organizations and activities, and divest interests that do not qualify under Canon~~s~~ 4~~ or 5~~.

(3) Upon notice of appointment to judicial office, a candidate shall wind up the candidate's law practice prior to taking office, and has six months from the date of taking office to resign from organizations and activities and divest interests that do not qualify under Canon~~s~~ 4~~ or 5~~.

Canon ~~8~~7. [Renumbered, but otherwise unchanged.]

ALTERNATIVE B

[The language proposed below in Canon 4 and Canon 5 would replace the current text found in Canon 4 and Canon 5 of the Code of Judicial Conduct; the other changes below would revise current Canon 2 and Canon 7 of the Code of Judicial Conduct as indicated.]

Canon 2. A Judge Should Avoid Impropriety and the Appearance of Impropriety in All Activities

A.-B. [Unchanged.]

C. A judge should not allow family, social, or other relationships to influence judicial conduct or judgment. A judge should not use the prestige of office to advance personal business interests or those of others. A judge should not appear as a witness in a court proceeding unless subpoenaed, but participation in activities allowed in Canon 4 and Canon 5 is not a violation of this principle.

D.-E. [Unchanged.]

Canon 4. A Judge May Engage in Extrajudicial Activities

A. Extrajuducial Activities in General. A judge may engage in extrajudicial activities, except as prohibited by law or this Code. However, when engaging in extrajudicial activities, a judge shall not:

(1) participate in activities that will interfere with the proper performance of the judge's judicial duties;

(2) participate in activities that will lead to frequent disqualification of the judge;

(3) participate in activities that would appear to a reasonable person to undermine the judge's independence, integrity, or impartiality;

B. Appearances before Governmental Bodies and Consultation with Government Officials. A judge may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice and may otherwise consult with such executive or legislative body or official on such matters.

C. Extra-~~J~~judicial Appointments. A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent the country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.

D. Use of Nonpublic Information. Information acquired by a judge in a judicial capacity should not be used or disclosed by the judge in financial dealings or for any other purpose not related to judicial duties.

E. Fiduciary Activities. A judge should not serve as an executor, administrator, testamentary trustee, or guardian, except for the estate, testamentary trust, or person of a member of the judge's immediate family, and then only if such service will not interfere with the proper performance of judicial duties. As a family fiduciary, a judge is subject to the following restrictions:

(1) A judge should not serve if it is likely that as such fiduciary the judge will be engaged in proceedings that would ordinarily come before the judge or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which the judge serves or one under its appellate jurisdiction.

(2) While acting as such fiduciary, a judge is subject to the same restrictions on financial activities that apply in the judge's personal capacity.

F. Arbitration. A judge should not act as an arbitrator or mediator, except in the performance of judicial duties.

G. Practice of Law. A judge should not practice law for compensation except as otherwise provided by law.

H. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on the judge's impartiality or judicial office, interfere with the proper performance of judicial duties, exploit the judicial position, or involve the judge in frequent transactions with lawyers or persons likely to come before the court on which the judge serves.

(2) Subject to the requirements of H(1), a judge may hold and manage investments, including real estate, and engage in other remunerative activity, but should not serve as director, officer, manager, advisor, or employee of any business. Provided, however, with respect to a judge holding office and serving as an officer, director, manager, advisor, or employee of any business not prohibited heretofore by law or judicial canon, the effective date of the prohibition contained herein shall be the date of expiration of the judge's current judicial term of office.

(3) A judge should manage investments and other financial interests to minimize the number of cases in which the judge is disqualified. As soon as it can be done without serious financial detriment, the judge should dispose of investments and other financial interests that require frequent disqualification.

Canon 5. A Judge Should Regulate Participation in Extrajudicial Activities and Acceptance of Gifts

A. Participation in Educational, Religious, Charitable, Fraternal, or Civic Organizations and Activities. Subject to the requirements of Canon 4, a judge shall not individually solicits funds, but may participate in activities sponsored by organizations or governmental entities concerned with the law, the legal system, or the administration of justice and those sponsored by or on behalf of educational, religious, charitable, fraternal, or civic organizations not conducted for profit, including but not limited to the following activities:

(1) assisting such an organization or entity in planning related to fundraising, and participating in the management and investment of the organization's or entity's funds;

(2) joining a general appeal on behalf of an organization or entity, or serving as a member of an honorary committee of such an organization, including allowing the judge's name and title to be used on the organization's letterhead if other members are similarly designated;

(3) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if

the event serves a fundraising purpose, the judge may not allow the judge's name or title to be used in advertising the event;

(4) making recommendations to such a public or private fund-granting organization or entity in connection with its programs and activities; and

(5) serving as an officer, director, trustee, or nonlegal advisor of such an organization or entity, unless it is likely that the organization or entity:

(a) will be engaged in proceedings that would ordinarily come before the judge; or

(b) will frequently be engaged in adversary proceedings in the court of which the judge is a member, or in any court subject to the appellate jurisdiction of the court of which the judge is a member.

B. Acceptance and Reporting of Gifts, Loans, Bequests, Benefits, or Other Things of Value.

(1) Neither a judge nor a family member residing in the judge's household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) A judge may accept a gift or gifts not to exceed a total value of $100, incident to a public testimonial; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the administration of justice.

(b) A judge or a family member residing in the judge's household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative; a wedding or engagement gift; a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges; or a scholarship or fellowship awarded on the same terms applied to other applicants.

(c) A judge or a family member residing in the judge's household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before the judge, and, if its value exceeds $100, the judge reports it in the same manner as compensation is reported in Canon 6C.

(2) For the purposes of this section, "family member residing in the judge's household" means any relative of a judge by blood or marriage, or a person treated by a judge as a family member, who resides in the judge's household.

(3) A judge is not required by this code to disclose income, debts, or investments, except as provided in this canon and Canons 3 and 6.

Canon 7. A Judge or a Candidate for Judicial Office Should Refrain From Political Activity Inappropriate to Judicial Office

A.-B. [Unchanged.]

C. Fundraising Other Than for Campaign Purposes Prohibited.

Except as provided in 7B(2)(b) and (c),

~~(1) No judge shall accept a testimonial occasion on the judge's behalf where the tickets are priced to cover more than the reasonable costs thereof, which may include only a nominal gift,~~

~~(2)~~ no judge or other person, party, committee, organization, firm, group, or entity may accept any contribution of money or of a tangible thing of value, directly or indirectly, to or for a judge's benefit for any purpose whatever, including, but not limited to, contributions for a campaign deficit, expenses associated with judicial office, a testimonial, an honorarium (other than for services, subject to Canon 6), or otherwise.

D. [Unchanged.]

Staff Comment: Two alternative proposals are published for comment in this order. The first, Alternative A, combines Canon 4 and Canon 5 so that the obligations imposed with regard to extrajudicial activities are the same for both law-related and nonlaw-related functions. The proposal also clarifies various allowed and prohibited fundraising activities.

The second proposal is modeled loosely on the ABA Model Code of Judicial Conduct. The most recent iteration of the ABA Model Code splits the existing language of Michigan's Canon 4 through Canon 6 into 15 separate rules. For purposes of the proposed language of Alternative B, however, the separate model rules are combined in the proposed revised text of Michigan's current two Canons, and would retain nearly all the language that currently exists in Canon 4 and Canon 5. But the proposal is similar to the ABA Model Code in that proposed Canon 4 would begin with a description of the underlying foundational requirements for any extrajudicial activities (i.e., participation in the activity must not undermine the judge's independence, integrity, or impartiality) and other general requirements, and then would set out the allowed fundraising and other financial activities in Canon 5.

Either proposal would eliminate the language of Canon 7 that prohibits a judge from accepting a testimonial, and would clarify Canon 2 so that activities allowed under Canon 4 and Canon 5 would not be considered a violation of the principle of use of the prestige of office. Both proposals contain proposed language that is intended to clarify the scope of activities in which a judge may participate, especially if those activities also serve a fundraising purpose. In Alternative A, this language is included at Canon 4D; in Alternative B, this language is included at Canon 5A(3).

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2005-11. Your comments and the comments of others will be posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/index.htm#proposed.

Order Entered December 2, 2011:

PROPOSED AMENDMENT OF MRPC 7.3 (REGARDING SOLICITATION OF POTENTIAL FAMILY LAW CLIENTS BY ATTORNEYS).

On order of the Court, this is to advise that the Court is considering an amendment of Rule 7.3 of the Michigan Rules of Professional Conduct. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[The present language is amended, with new language indicated in underlining and deleted language by strikeover.]

RULE 7.3. DIRECT CONTACT WITH PROSPECTIVE CLIENTS.

(a) A lawyer shall not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship when a significant motive for doing so is the lawyer's pecuniary gain. The term "solicit" includes contact in person, by telephone or telegraph, by letter or other writing, or by other communication directed to a specific recipient, but does not include letters addressed or advertising circulars distributed generally to persons not known to need legal services of the kind provided by the lawyer in a particular matter, but who are so situated that they might in general find such services useful, nor does the term "solicit" include "sending truthful and nondeceptive letters to potential clients known to face particular legal problems" as elucidated in *Shapero v Kentucky Bar Ass'n*, 486 US 466, 468; 108 S Ct 1916; 100 L Ed 2d 475 (1988). However, in any matter that involves a family law case in a Michigan trial court, a lawyer shall not initiate contact or solicit a party to establish a client-lawyer relationship until the initiating documents have been served upon that party or 14 days have passed since the date the document was filed, whichever action occurs first. This limitation does not apply if the party and lawyer have a pre-existing family or client-lawyer relationship. For purposes of this rule, "family law case" includes the following case-type code designations from MCR 8.117: DC, DM, DO, DP, DS, DZ, NA, PJ, PH, PP, or VP.

(b) A lawyer shall not solicit professional employment from a prospective client by written or recorded communication or by in-person or telephone contact even when not otherwise prohibited by paragraph (a), if:

(1) the prospective client has made known to the lawyer a desire not to be solicited by the lawyer; or

(2) the solicitation involves coercion, duress, or harassment.

Staff Comment: This proposal was submitted by the State Bar of Michigan Representative Assembly. The proposed amendment is designed so that it would limit situations in which an attorney soliciting new clients would inform a defendant or respondent that an action has been filed against him or her before the defendant or respondent is served with the papers. The bar argues that allowing attorneys to notify defendants before service leads to greater risk of domestic violence against the filing party or other illegal actions (such as absconding with children or removing assets from a joint bank or other financial account) that may occur before service can be completed.

The staff comment is not an authoritative construction by the Court.

A copy of the order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by March 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-22. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

HATHAWAY, J. When commenting on the proposed amendment to the rule, please address whether the proposed amendment is consistent with *Shapero v Kentucky Bar Ass'n*, 486 US 466; 108 S Ct 1916; 100 L Ed 2d 475 (1988), or raises any other constitutional concerns.

Orders Entered December 21, 2011:

PROPOSED AMENDMENTS OF MCR 1.109, 2.107, 2.113, 2.114, 2.518, 3.001, 3.101, 3.218, 3.800, 3.901, 3.903, 3.930, 4.001, 5.101, 5.113, 5.731, 6.007, 8.108, AND 8.119.

On order of the Court, this is to advise that the Court is considering amendments of Rules 1.109, 2.107, 2.113, 2.114, 2.518, 3.001, 3.101, 3.218, 3.800, 3.901, 3.903, 3.930, 4.001, 5.101, 5.113, 5.731, 6.007, 8.108, and 8.119 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is shown by strikeover.]

RULE 1.109 ~~PAPER AND TYPE-SIZE STANDARD~~ COURT RECORDS DEFINED; DOCUMENT DEFINED; FILING STANDARDS; SIGNATURES; AND ACCESS.

(A) Court Records Defined.

(1) Court records are defined by MCR 8.119 and this subrule. Court records are recorded information of any kind that has been created by the court or filed with the court in accordance with Michigan Court Rules. Court records may be created using any means and may be maintained in any medium authorized by these court rules provided those records comply with other provisions of law and these court rules.

(a) Records include, but are not limited to:

(i) documents, attachments to documents, exhibits, discovery materials, and other materials filed with the clerk of the court,

(ii) documents, recordings, data, and other recorded information created or handled by the court, including all data produced in conjunction with the use of any system for the purpose of transmitting, accessing, reproducing, or maintaining court records.

(b) For purposes of this subrule:

(i) Documents include, but are not limited to, pleadings, orders, and judgments.

(ii) Recordings refer to audio and video recordings (whether analog or digital), stenotapes, log notes, and other related records.

(iii) Data refers to any information entered in the case management system that is not ordinarily reduced to a document, but that is still recorded information.

(iv) Other recorded information includes, but is not limited to, notices, bench warrants, arrest warrants, and other process issued by the court that do not have to be maintained on paper or digital image.

(2) Discovery materials or exhibits not filed with the clerk of the court that are offered into evidence pursuant to MCR 2.518 or MCR 3.930 are not court records even though received and maintained by the court.

(B) Document Defined. A document means a record produced on paper or a digital image of a record originally produced on paper or originally created by an approved electronic means, the output of which is readable by sight and can be printed to paper.

(C) Filing Standards.

~~(A)~~ (1) All pleadings and other documents ~~papers~~ prepared for filing in the courts of this state must comply with MCR 8.119(C) and be filed on good quality $8^1/_2$ by 11 inch paper, or transmitted through an approved electronic means or created electronically by the court and maintained in a digital image. ~~and t~~The print must be no smaller than ~~12-point type~~ 10 characters per inch (nonproportional) or 12-point (proportional), except with regard~~. This requirement does not apply~~ to

~~(1)~~ forms approved by the State Court Administrative Office~~, and~~ .

(2) ~~attachments and exhibits, but parties are encouraged to reduce or enlarge such papers to $8^1/_2$ by 11 inches, if practical~~All other materials submitted for filing shall be prepared in accordance with this subrule and standards established by the state court administrative office. An attachment, discovery material, or an exhibit that is submitted for filing shall be made part of the public case file unless otherwise confidential.

(3) All original documents filed on paper may be reproduced and maintained by the court as a digital image in place of the paper original in accordance with standards and guidelines established by the state court administrative office.

~~(B)~~(4) ~~Court clerks~~ A clerk of the court may ~~not accept~~ reject nonconforming ~~papers~~documents as prescribed by MCR 8.119~~except on written direction of a judge~~.

(D) Signatures.

(1) A signature, as required by these court rules and law, means a written signature as defined by MCL 8.3q or an electronic signature as defined by this subrule.

(2) An electronic signature means an electronic sound, symbol, or process, attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(3) If a law or court rule requires a signature to be notarized or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law or court rule, is attached to or logically associated with the signature.

(4) Retention of a signature electronically affixed to a document that will be retained by the court in electronic format must not be dependent upon the mechanism that was used to affix that signature.

(E) Requests for access to public court records shall be granted in accordance with MCR 8.119(H).

RULE 2.107. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS.

(A)-(F) [unchanged.]

(G) Filing With Court Defined. ~~The filing of p~~ Pleadings and other ~~papers~~ materials filed with the court as required by these rules must be filed with the clerk of the court in accordance with standards prescribed by MCR 1.109(C), except that the judge to whom the case is assigned may accept ~~papers~~ materials for filing when circumstances warrant. A judge who does so shall note the filing date on the ~~papers~~materials and immediately transmit them ~~forthwith~~to the clerk. It is the responsibility of the party who presented the ~~papers~~ materials to confirm that they have been filed with the clerk. If the clerk ~~dockets~~ records ~~papers~~ the receipt of materials on a date other than the filing date, the clerk shall ~~note~~record the filing date on the register of actions.

RULE 2.113. FORM OF PLEADINGS AND OTHER PAPERS.

(A) [Unchanged.]

(B) Preparation. Every pleading must be legibly printed in the English language ~~in type no smaller than 12 point~~ and in compliance with MCR 1.109.

(C)-(G) [Unchanged.]

RULE 2.114. SIGNATURES OF ATTORNEYS AND PARTIES; VERIFICATION; EFFECT; SANCTIONS.

(A)-(B) [Unchanged.]

(C) Signature.

(1)–(2) [Unchanged.]

(3) An electronic signature is acceptable provided it complies with MCR 1.109(D).

(D)-(F) [Unchanged.]

RULE 2.518. RECEIPT AND RETURN OR DISPOSAL OF EXHIBITS.

(A) Receipt of Exhibits. Exhibits introduced into evidence at or during court proceedings shall be received and maintained as provided by Michigan Supreme Court trial court case file management standards. As defined in MCR 1.109, exhibits received and accepted into evidence under this rule are not court records.

(B) Return or Disposal of Exhibits. At the conclusion of a trial or hearing, the court shall direct ~~exhibits should be retrieved by~~ the parties to retrieve the exhibits submitted by ~~submitting~~ them except that any weapons and drugs shall be returned to the confiscating agency for proper disposition. If the exhibits are not retrieved by the parties as directed, within 56 days after conclusion of the trial or hearing, the court may properly dispose of the exhibits without notice to the parties.

(C) Confidentiality. If the court retains an exhibit filed pursuant to MCR 1.109(C) after a hearing or trial and the exhibit is confidential as provided by law, court rule, or court order pursuant to MCR 8.119(I), the court must continue to maintain the exhibit in a confidential manner.

RULE 3.001. APPLICABILITY AND SCOPE.

The rules in this chapter apply in circuit court and in other courts as provided by law or by these rules. Except as otherwise provided in this chapter and law, proceedings under this chapter are governed by Michigan Court Rules.

RULE 3.101. GARNISHMENT AFTER JUDGMENT.

(A)–(B) [Unchanged.]

(C) ~~Forms. The state court administrator shall publish approved forms for use in garnishment proceedings. Separate forms shall be used for periodic and nonperiodic garnishments. The verified statement, writ, and disclosure filed in garnishment proceedings~~Unless this rule requires use of a form approved by the state court administrator, documents prepared under this rule must be substantially in the form approved by the state court administrator.

(D) Request for and Issuance of Writ. ~~The clerk of the court that entered the judgment shall review the request. The clerk shall issue a writ of garnishment if the writ appears to be correct, complies with these rules and the Michigan statutes, and if~~ The request for a writ of garnishment shall be made and filed by the plaintiff, or someone on the plaintiff's behalf, ~~makes and files a statement~~ on a form approved by the state court administrator. The request shall be verified in the manner provided in MCR 2.114(A) ~~stating~~ and shall state:

(1) that a judgment has been entered against the defendant and remains unsatisfied;

(2) the amount of the judgment; the total amount of the postjudgment interest accrued to date; the total amount of the postjudgment costs accrued to date; the total amount of the postjudgment payments made to date, and the amount of the unsatisfied judgment now due (including interest and costs);

(3) that the person signing the verified statement knows or has good reason to believe that

(a) a named person has control of property belonging to the defendant,

(b) a named person is indebted to the defendant, or

(c) a named person is obligated to make periodic payments to the defendant.

(4) that payments withheld by the garnishee pursuant to the writ are to be made directly to either the

(a) plaintiff or

(b) plaintiff's attorney.

(E) Writ of Garnishment.

(1) Issuance of Writ.

~~(1)~~(a) The clerk of the court shall issue a writ of garnishment on a form approved by the state court administrator ~~must have attached or must include a copy of the verified statement requesting issuance of the writ, and must include information that will permit the garnishee to identify the defendant, such as the defendant's address, social security number, employee identification number, federal tax identification number, employer number, or account number, if known.~~

~~(2) Upon issuance of the writ, it shall be~~ if the request complies with subrule (D) and a judgment was entered by that court and remains unsatisfied. ~~served upon the garnishee as provided in subrule (F)(1).~~ The writ shall include the date on which it was issued and the last day by which it must be served to be valid, which is 91 days after it was issued.

(2)~~(3)~~ The writ shall direct the garnishee to:

(a) serve a copy of the writ on the defendant as provided in subrule (F)(2);

(b) within 14 days after the service of the writ, ~~file with the court clerk~~prepare and mail or deliver to the plaintiff and defendant a verified disclosure pursuant to subrule (G) indicating the garnishee's liability (as specified in subrule [G][1]) to the defendant and mail or deliver a copy to the plaintiff and the defendant;

(c) deliver no tangible or intangible property to the defendant, unless allowed by statute or court rule;

(d) pay no obligation to the defendant, unless allowed by statute or court rule; ~~and~~

(e) ~~in the discretion of the court and~~ in accordance with subrule (J), order the garnishee ~~either~~ to ~~(i)~~make all payments directly to the plaintiff or his or her attorney; and

~~(ii) send the funds to the court in the manner specified in the writ.~~

(f) pursuant to subrule (J)(5) for periodic garnishments, prepare and mail or deliver to the plaintiff and defendant a final statement of the total amount paid on the writ.

(3)~~(4)~~ The writ shall direct the defendant to refrain from disposing of

(a) any negotiable instrument representing a debt of the garnishee (except the earnings of the defendant), or

(b) any negotiable instrument of title representing property in which the defendant claims an interest held in the possession or control of the garnishee.

(4)~~(5)~~ The writ shall inform the defendant that unless the defendant files objections within 14 days after the service of the writ on the defendant,

(a) without further notice the property or debt held pursuant to the garnishment may be applied to the satisfaction of the plaintiff's judgment, and

(b) periodic payments due to the defendant may be withheld for as long as 91 days after the issuance of the writ and ~~in the discretion of the court~~ paid directly to the plaintiff.

(5)~~(6)~~ The writ shall direct the plaintiff to:

(a) serve on the garnishee, in the manner prescribed by subrule(F)(1), the following: ~~the garnishee~~

(i) a copy of the writ along with information in a separate writing that will permit the garnishee to identify the defendant, such as the defendant's social security number, employee identification number, federal tax identification number, employer number, or account number, if known ~~as provided in subrule (F)(1)~~,

(ii) a state court administrator-approved disclosure form.

The identifying information shall not be filed with the court.

(b) ~~and to~~ file a proof of service with the court.

(F) Service of Writ.

(1) The plaintiff shall serve ~~the writ of garnishment, a copy of the writ for the defendant, the disclosure form, and any applicable fees,~~ on the garnishee within 91 days after the date the writ was issued in the manner provided for the service of a summons and complaint in MCR 2.105 the following:

(a) the request and writ of garnishment for the garnishee's records along with the identifying information specified in subrule (E)(5)(a)(i),

(b) a copy of the request and writ for serving on the defendant,

(c) a state court administrator-approved disclosure form for the garnishee's use, and

(d) any applicable fees.

(2) The garnishee shall within 7 days after being served with the ~~writ~~ items specified in subrule (1) deliver a copy of the writ to the defendant or mail a copy to the defendant at the defendant's last known address by first-class mail.

(G) [Unchanged.]

(H) Disclosure. The garnishee shall mail or deliver to ~~the court,~~ the plaintiff, and the defendant~~, a verified disclosure~~ within 14 days after

~~being served with~~ service of the writ a verified disclosure substantially in the form approved by the state court administrator. If the disclosure is subsequently filed with the court for any reason, it shall be nonpublic.

(1) Nonperiodic Garnishments.

(a) If indebted to the defendant, the garnishee shall ~~file~~ prepare a disclosure revealing the garnishee's liability to the defendant as specified in subrule (G)(1) and claiming any setoff that the garnishee would have against the defendant, except for claims for unliquidated damages for wrongs or injuries.

(b) If not indebted to the defendant, the garnishee shall ~~file~~ prepare a disclosure so indicating.

(c) If the garnishee is indebted to the defendant, but claims that withholding is exempt under MCR 3.101(I)(6), the garnishee shall indicate on the disclosure the specific exemption. If the garnishee is indebted, but claims that withholding is exempt for some reason other than those set forth in MCR 3.101(I)(6), the garnishee shall indicate on the disclosure the basis for its claim of exemption and cite the legal authority for the exemption.

(2) [Unchanged.]

(I)Withholding. This subrule applies only if the garnishee is indebted to or obligated to make periodic payments to the defendant.

(1)-(3) [Unchanged.]

(4) At the time that a periodic payment is withheld, the garnishee shall provide the following information to the plaintiff and defendant:

(a) the name of the parties;

(b) the case number;

(c) the date and amount withheld;

(d) the balance due on the writ.

~~The information shall also be provided to the court if funds are sent to the court.~~

(5)-(6) [Unchanged.]

(J) Payment.

(1) After 28 days from the date of the service of the writ on the garnishee, the garnishee shall transmit all withheld funds to the plaintiff or the ~~court~~ plaintiff's attorney as directed ~~by the court~~ in the writ pursuant to subrule (E)(~~3~~2)(e) unless notified that objections have been filed.

(2) For periodic garnishments, all future payments shall be paid as they become due as directed ~~by the court~~ in the writ pursuant to subrule (E)(~~3~~2)(e) until expiration of the garnishment.

~~(3) Upon receipt of proceeds from the writ, the court shall forward such proceeds to the plaintiff.~~

(~~4~~)(3) Payment to the plaintiff may not exceed the amount of the unpaid judgment, interest, and costs stated in the verified statement requesting the writ of garnishment. If the plaintiff claims to be entitled to a larger amount, the plaintiff must proceed by motion with notice to the defendant.

~~(5)~~(4) In the case of earnings, the garnishee shall maintain a record of all payment calculations and shall make such information available for review by the plaintiff, the defendant, or the court, upon request.

~~(6)~~(5) For periodic garnishments, within 14 days after the expiration of the writ or after the garnishee is no longer obligated to make periodic payments, the garnishee shall ~~file with the court and~~ mail or deliver to the plaintiff and the defendant, a final statement of the total amount paid on the writ. ~~If the garnishee is the defendant's employer, the statement is to be filed within 14 days after the expiration of the writ, regardless of changes in employment status during the time that the writ was in effect.~~ The statement shall include the following information:

(a) the names of the parties and the court in which the case is pending;

(b) the case number;

(c) the date of the statement;

(d) the total amount withheld;

~~(e) the difference between the amount stated in the verified statement requesting the writ and the amount withheld.~~

(6)~~(7)~~ If the disclosure states that the garnishee holds property other than money belonging to the defendant, the plaintiff must proceed by motion (with notice to the defendant and the garnishee) to seek an appropriate order regarding application of the property to satisfaction of the judgment. If there are no pending objections to the garnishment, and the plaintiff has not filed such a motion within 56 days after the filing of the disclosure, the garnishment is dissolved and the garnishee may release the property to the defendant.

(K)–(T) [Unchanged.]

RULE 3.218. ~~ACCESS TO~~ FRIEND OF THE COURT RECORDS; ACCESS.

(A) General Definitions. When used in this subrule, unless the context indicates otherwise,

(1) "records" means paper files, computer files, microfilm, microfiche, audio tape, video tape, ~~and~~ photographs, and includes records as defined in MCR 1.109;

(2)-(3) [Unchanged.]

(B)–(H) [Unchanged.]

RULE 3.800. APPLICABLE RULES; INTERESTED PARTIES; INDIAN CHILD.

(A) Generally. Except as modified by MCR 3.801-3.80~~6~~7, adoption proceedings~~,~~ are governed by ~~the rules generally applicable to civil proceedings~~ Michigan Court Rules.

(B) [Unchanged.]

RULE 3.901. APPLICABILITY OF RULES.

(A) Scope.

(1) The rules in this subchapter, in subchapter 1.100, ~~and~~ in MCR 5.113, and in subchapter 8.100 govern practice and procedure in the family division of the circuit court in all cases filed under the Juvenile Code.

(2)–(3) [Unchanged.]

(B) [Unchanged.]

RULE 3.903. DEFINITIONS.

(A) General Definitions. When used in this subchapter, unless the context otherwise indicates:

(1)–(24) [Unchanged.]

(25) "Records" are as defined in MCR 1.109 and include ~~means the~~ pleadings, motions, authorized petitions, notices, memoranda~~ums~~, briefs, exhibits, available transcripts, findings of the court, registers of action~~s~~, and court orders.

(26)–(27) [Unchanged.]

(B)–(F) [Unchanged.]

RULE 3.930. RECEIPT AND RETURN OR DISPOSAL OF EXHIBITS IN JUVENILE PROCEEDINGS.

(A) Receipt of Exhibits. Exhibits introduced into evidence at or during court proceedings shall be received and maintained as provided by the Michigan Supreme Court trial court c~~C~~ase f~~F~~ile m~~M~~anagement s~~S~~tandards. As defined in MCR 1.109, exhibits received and accepted into evidence under this rule are not court records.

(B) Return or Disposal of Exhibits. At the conclusion of a trial or hearing, the court shall direct ~~exhibits should be retrieved by~~ the parties ~~who~~ to retrieve the exhibits submitted by them except that any weapons and drugs shall be returned to the confiscating agency for proper disposition. If the exhibits are not retrieved by the parties as directed, within 56 days after conclusion of the trial or hearing, the court may properly dispose of the exhibits without notice to the parties.

(C) Confidentiality. If the court retains an exhibit filed pursuant to MCR 1.109(C) after a hearing or trial and the exhibit is confidential as provided by MCR 3.903(A)(3) or order of the court pursuant to MCR 8.119(I), the court must continue to maintain the exhibit in a confidential manner.

RULE 4.001. APPLICABILITY.

~~Procedure in the district and municipal courts is governed by the rules applicable to other actions.~~ The rules in this chapter apply to the specific types of proceedings within the jurisdiction of the district and municipal courts. Except as otherwise provided in this chapter, proceedings under this chapter are governed by Michigan Court Rules.

RULE 5.101. FORM AND COMMENCEMENT OF ACTION; CONFIDENTIAL RECORDS.

(A)–(C) [Unchanged.]

(D) Records are public except as otherwise indicated in court rule and statute.

RULE 5.113. PAPERS; FORM AND FILING.

(A) Form of Papers Generally.

(1) An application, petition, motion, inventory, report, account, or other paper in a proceeding must

(a) comply with MCR 1.109 and be legibly typewritten or printed in ink in the English language, and

(b)–(c) [Unchanged.]

(2) A judge or register ~~shall not receive and file a nonconforming paper~~ may reject nonconforming documents in accordance with MCR 8.119.

(B)-(D) [Unchanged.]

RULE 5.731. CONFIDENTIAL RECORDS.

Records are public except as otherwise indicated in court rule or statute.

RULE 6.007. CONFIDENTIAL RECORDS.

Records are public except as otherwise indicated in court rule or statute.

RULE 8.108. COURT REPORTERS AND RECORDERS.

(A)–(B) [Unchanged.]

(C) Records Kept. All records, as defined in MCR 8.119(F) and regardless of format, that are created and kept by the court reporter or recorder belong to the court, must remain in the physical possession of the court, and are subject to access in accordance with MCR 8.119(H). The court reporter or recorder who takes the testimony on the trial or the hearing of any case shall prefix the record of the testimony of each witness with the full name of the witness and the date and time the testimony was taken. At the conclusion of the trial of the case the reporter or recorder shall secure all of the records and properly entitle them on the outside, and shall safely keep them in ~~his or her office~~ the court according to the Michigan Trial Court Case File Management Standards. If the court reporter or recorder needs access to the records for purposes of transcribing off-site, the reporter or recorder may take only a reproduction of the original recording, which must be returned to the court upon filing of the transcript.

(D) Transfer of Records; Inspection. If the court reporter or recorder dies, resigns, is removed from office, or leaves the state, ~~his or her~~ records he or she created and kept in each case pursuant to subrule (C) must be transferred to the clerk of the court in which the case was tried. The clerk shall safely keep the records ~~subject to the direction of the court~~ in accordance with the Michigan Trial Court Case File Management Standards and MCR 8.119(F). ~~The records are part of the record of each case and are subject to inspection in the same manner as other records.~~ On order of the court, a transcript ~~may~~ shall be made from the records and filed as a part of the public record in the case.

(E)–(G) [Unchanged.]

RULE 8.119. COURT RECORDS AND REPORTS; DUTIES OF CLERKS.

(A) Applicability. This rule applies to all ~~actions~~ records in every trial court ~~except that subrule (D)(1) does not apply to civil infractions~~. For purposes of this rule, records are as defined in MCR 1.109, MCR 3.218, MCR 3.903, and MCR 8.119(D)-(G).

(B) Records Standards. The clerk of the court shall comply with the records standards in this rule, MCR 1.109, and as otherwise prescribed by the Michigan Supreme Court.

(C) Filing of ~~Papers~~ Documents and Other Materials. The clerk of the court shall endorse on the first page of every document the date on which it is filed. ~~Papers~~ Documents and other materials filed with the ~~clerk of the~~ court as defined in MCR 2.107(G) must comply with Michigan Court Rules and Michigan Supreme Court records standards. The clerk of the court may only reject ~~papers~~ documents ~~which do not conform to MCR 2.113(C)(1) and MCR 5.113(A)(1)~~that do not meet the following minimum filing requirements:

(1) standards prescribed by MCR 1.109,

(2) legibility and language as prescribed by MCR 2.113(B) and MCR 5.113(A),

(3) captioning prescribed by MCR 2.113(C)(1) and MCR 5.113(A)(1),

(4) signature prescribed by MCR 2.114(C) and MCR 5.114(A), and

(5) the filing fee is not paid at the time of filing, unless waived or suspended by court order.

(D) Records Kept by the Clerk of the Court. The clerk of the court ~~of every trial court~~ shall keep the following case records ~~in the form and style the court prescribes and~~ in accordance with the court rules, Michigan Supreme Court records standards and local court plans. ~~A court may adopt a computerized, microfilm, or word-processing system for maintaining records that substantially complies with this subrule.~~ Documents and other materials made confidential by court rule, statute, or order of the court pursuant to subrule (I) must be designated as confidential and maintained to allow only authorized access. In the event of transfer or appeal of a case, every rule, statute, or order of the court pursuant to subrule (I) that makes a document or other materials in that case confidential applies uniformly to every court in Michigan, irrespective of the court in which the document or other materials were originally filed.

(1) Indexes and Case Files. Except for civil infractions, ~~T~~the clerk shall keep and maintain records of each case consisting of a numerical index, an alphabetical index, a register of actions, and a case file in such form and style as may be prescribed by the Supreme Court. Each case shall be assigned a case number on receipt of a complaint, petition, or other initiating document. The case number shall comply with MCR 2.113(C)(1)(c) or MCR 5.113(A)(1)(b)(ii) as applicable. In addition to the case number, a separate petition number shall be assigned to each petition filed under the Juvenile Code as required under MCR 5.113(A)(1)(b)(ii). The case number (and petition number if applicable)

shall be recorded on the register of actions, file ~~folder~~, numerical index, and alphabetical index. The records shall include the following characteristics:

(a) Numerical Index. The clerk shall maintain a numerical index as a list of consecutive case numbers on which the date of filing and the names of the parties are recorded. The index may be maintained either as a central index for all cases filed in the court or as separate lists for particular types of cases or particular divisions of the court.

(b) Alphabetical Index. The clerk shall maintain a central alphabetical index or separate alphabetical indexes for particular types of cases or particular divisions of the court on which the date of filing, names of all parties, and the case number are recorded.

(c) Register of Actions. The clerk shall keep a case history of each case, known as a register of actions. The register of actions shall contain both pre- and post-judgment information. When a case is commenced, a register of actions form shall be created. The case identification information in the alphabetical index shall be entered on the register of actions. In addition, the following shall be noted chronologically on the register of actions as it pertains to the case:

(i) the offense (if one);

(ii) the judge assigned to the case;

(iii) the fees paid;

(iv) the date and title of each filed ~~document~~ item;

(v) the date process was issued and returned, as well as the date of service;

(vi) the date of each event and type and result of action;

(vii) the date of scheduled trials, hearings, and all other appearances or reviews, including a notation indicating whether the proceedings were heard on the record and the name and certification number of the court reporter or recorder present;

(viii) the orders, judgments, and verdicts;

(ix) the judge at adjudication and disposition;

(x) the date of adjudication and disposition; and

(xi) the manner of adjudication and disposition.

Each notation shall be brief, but shall show the nature of each ~~paper~~ item filed, each order or judgment of the court, and the returns showing execution. Each notation shall be dated with not only the date of filing, but with the date of entry and shall indicate the person recording the action.

(d) Case file. The clerk of the court shall maintain a paper and/or electronic file ~~folder~~ for each action, bearing the case number assigned to it, in which the clerk shall keep all pleadings, process, written opinions and findings, orders, and judgments filed in the action. Additionally, the clerk shall keep in the file all other ~~documents~~ materials prescribed by court rule, statute, or as ordered by the court to be filed with the clerk of the court. If other records of a case file are maintained separately from the file ~~folder~~, the clerk shall keep them as prescribed by trial court case file management standards.

(2) Calendars. The clerk may maintain calendars of actions. A calendar is a schedule of cases ready for court action that identifies times and places of activity.

(3) Abolished Records.

(a) Journals. Except for recording marriages, journals shall not be maintained.

(b) Dockets. A register of actions replaces a docket. Wherever these rules or applicable statutes require entries on a docket, those entries shall be entered on the register of actions.

(E)~~(4)~~ Other Case Records. The clerk or other persons designated by the chief judge of the court shall keep in ~~such~~ the ~~form~~ manner ~~as may be~~ prescribed by these rules ~~court~~, other ~~papers, documents,~~ materials~~, and things~~ filed with or handled by the court for purposes of case processing, including but not limited to wills for safekeeping, case evaluations, exhibits logs, ~~and other discovery materials~~, probation files, and friend of the court records ~~requests for search warrants, marriage records, and administrative activities~~.

(F) Court Recordings, Log Notes, Jury Seating Charts, and Media. Court recordings, log notes, jury seating charts, and all other records such as tapes, backup tapes, discs, and any other medium used or created in the making of a record of proceedings and kept pursuant to MCR 8.108 are court records and are subject to access in accordance with subrule (H)(2)(b).

(G) Other Court Records. All court records not included in subrules (D), (E), and (F) are considered administrative and fiscal records or nonrecord materials and are not subject to public access under subrule (H). These records are defined in the approved records retention and disposal schedule for trial courts.

~~(E)~~(H)Access to Records. Except as otherwise provided in subrule (F), only case records as defined in subrule (D) are public records, subject to access in accordance with these rules. The clerk may not permit any case record ~~or paper on file in the clerk's office~~ to be taken from ~~it~~ the court without the order of the court. A court may provide access to the public information in a register of actions through a publicly accessible website; however, all other public information in its case records may be provided through electronic means only upon request. The court may provide access to any case record that is not a document, as defined by MCR 1.109(B), if it can reasonably accommodate the request. Any materials filed with the court pursuant to MCR 1.109(C)(2), in a medium in which the court does not have the means to readily access and reproduce those materials, may be made available for public inspection using court equipment only. The court is not required to provide the means to access or reproduce the contents of those materials if the means is not already available.

(1) Unless access to a ~~file, a document~~ case record~~;~~ or information contained in a ~~file or document~~ record as defined in subrule (D) is restricted by statute, court rule, or an order entered pursuant to subrule (~~F~~I), any person may inspect ~~pleadings and other papers in the clerk's office~~ that record and may obtain copies as provided in subrule ~~(E)(2) and (E)(3)~~(J).

~~(2) If a person wishes to obtain copies of papers in a file, the clerk shall provide copies upon receipt of the reasonable cost of reproduction. If the clerk prefers, the requesting person may be permitted to make copies at personal expense under the direct supervision of the clerk. Except for copies of transcripts or as otherwise directed by statute or court rule, a standard fee may be established for providing copies of papers on file.~~

~~(3) A court is not required to create a new record, except to the extent required by furnishing copies of a file, paper, or record. A court may create a new record or compilation of records pertaining to case files or case-related information on request, provided that the record created or compiled does not disclose information that would otherwise be confidential or restricted by statute, court rule, or an order entered pursuant to subrule (F).~~ In accordance with subrule (J), the court may collect a fee for the cost of this service, including the cost of providing the new record in a particular medium.

~~(4)~~(2) Every court, shall adopt an administrative order pursuant to MCR 8.112(B) to

(a) make reasonable regulations necessary to protect its public records and prevent excessive and unreasonable interference with the discharge of its functions;

(b) outline the procedure for accessing records defined in subrule (F);

~~(b)~~(c) specify the reasonable cost of reproduction of records provided under subrule ~~(E)(2)~~(J); and

~~(c)~~(d) specify the process for determining costs under subrule ~~(E)(3)~~(J).

~~(F)~~(I) [Relettered, but otherwise unchanged.]

(J) Access and Reproduction Fees.

(1) A court may not charge an access or reproduction fee for a case record that the court is required by law or court rule to provide without charge to a person or other entity, irrespective of the medium in which the case record is retained, the manner in which access to the case record is provided, and the technology used to create, store, retrieve, reproduce, and maintain the case record.

(2) The court may provide access to its public case records in any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to 24.403. If a court maintains its public records in electronic format only,

(a) the court may not charge a fee to access those case records when access is made on-site through a public terminal or when a verbal request for public information is made on-site to the clerk.

(b) the court or a contracted entity may charge a fee, in accordance with Supreme Court order, to access those case records when the access is made off-site through a document management, imaging, or other electronic records management system.

(3) Reproduction of a case record means the act of producing a copy of that record through any medium authorized by the records reproduction act, 1992 PA 116; MCL 24.401 to 24.403.

(a) A court may charge only for the actual cost of labor and supplies and the actual use of the system, including printing from a public

terminal, to reproduce a case record and not the cost associated with the purchase and maintenance of any system or technology used to store, retrieve, and reproduce a case record.

(b) If a person wishes to obtain copies of documents in a file, the clerk shall provide copies upon receipt of the actual cost of reproduction.

(c) Except as otherwise directed by statute or court rule, a standard fee may be established, pursuant to (H)(2), for providing copies of documents on file.

(4) A court is not required to create a new record out of its existing records. A new record means the compilation of information into a format that does not currently exist or that cannot be generated electronically using predefined formats available through a court's case management system. Providing access to documents or furnishing copies of documents in an existing file does not constitute creation of a new record, even when the output appears in a format different than the format of the original record or document because the output is the result of predefined formats.

(a) A court may create a new record or compilation of records pertaining to case files or case-related information on request, provided that the record created or compiled does not disclose information that would otherwise be confidential or restricted by statute, court rule, or an order entered pursuant to subrule (I).

(b) A court may charge only for the actual cost of labor and supplies and the actual use of the system to develop, generate, and validate the accuracy of a new record and not the cost associated with the purchase and maintenance of any system or technology used to store, retrieve, and reproduce the information or documents for creating a new record.

(c) If a person requests the creation of a new record, the clerk shall provide access to the new record upon receipt of the actual cost of creating the record.

(K) Retention Periods.

For purposes of retention, the records of the trial courts include: (1) administrative and fiscal records, (2) case records, (3) and nonrecord material. The records of the trial courts shall be retained in the medium prescribed by MCR 1.109. The records of a trial court may not be destroyed except upon order by the chief judge of that court. Before destroying records subject to the order, the court shall first transfer to the Archives of Michigan any records specified as such by State Archives in the Michigan trial courts approved records retention and disposal schedule. An order of destruction shall comply with the retention periods established by the State Court Administrative Office and approved by the state court administrator, Attorney General, State Administrative Board, and Archives and Records Management Services of the Department of Management and Budget, in accordance with MCL 399.5.

~~(G)~~(L) [Relettered, but otherwise unchanged.]

Staff Comment: The proposed amendments of these rules would update the rules making them less "paper" focused and reflecting the use of electronic technology in the way courts process court records.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-47. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED AMENDMENT OF MCR 3.204.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.204 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal, or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/Resources/Administrative/index.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 3.204. PROCEEDINGS AFFECTING CHILDREN.

(A) Unless the court orders otherwise for good cause, if a circuit court action involving child support, custody, or parenting time is pending, or if the circuit court has continuing jurisdiction over such matters because of a prior action:

(1) A new action concerning support, custody or parenting time of the same child must be filed as a motion ~~or supplemental complaint~~ in the earlier action. ~~The new action shall be filed as a motion~~ if the relief sought would have been available in the original cause of action. If the relief sought was not available in the original action, the new action must be filed as a ~~supplemental~~ new complaint.

(2) A new action for the support, custody, or parenting time of a different child of the same parents must be filed ~~as a supplemental complaint in the earlier action if the court has jurisdiction and the new action is not an action for divorce, annulment, or separate maintenance.~~

~~(3) A new action for divorce, annulment, or separate maintenance that also involves the support, custody, or parenting time of that child must be filed~~ in the same county as the prior action if the circuit court for that county has jurisdiction over the new action and the new case must be assigned to the same judge to whom the previous action was assigned.

(3) Whenever possible, all actions involving children of the same parents shall be administered together. When the court enters a final order in a new action involving a new child of those parents, the order shall include comprehensive provisions for custody, parenting time, and support for both that child and any children named in previous actions involving the same parents. The order must refer to the other cases and state that it supersedes the custody, parenting time, and support provisions of the orders entered previously in those cases. In the new action, the court may modify substantive provisions in preexisting orders involving another child or children of the same parents, provided that the modification is supported by evidence presented in the new case and both parents have had an opportunity to be heard concerning the proposed modifications.

~~(4) A party may file a supplemental pleading required by this subrule without first seeking and obtaining permission from the court. The supplemental pleading must be served as provided in MCR 3.203(A)(2), and an answer must be filed within the time allowed by MCR 2.108. When this rule requires a supplemental pleading, all filing and judgment entry fees must be paid as if the action was filed separately.~~

(B) When more than one circuit court action involving support, custody, or parenting time of a child is pending, or more than one circuit court has continuing jurisdiction over those matters because of prior actions, ~~an original or supplemental~~ a complaint for the support, custody, or parenting time of a different child of the same parents must be filed in whichever circuit court has jurisdiction to decide the new action. If more than one of the previously involved circuit courts would have jurisdiction to decide the new action, or if the action might be filed in more than one county within a circuit:

(1) The new action must be filed in the same county as a prior action involving the parents' separate maintenance, divorce, or annulment.

(2) If no prior action involves separate maintenance, divorce, or annulment, the new action must be filed:

(a) in the county of the circuit court that has issued a judgment affecting the majority of the parents' children in common, or

(b) if no circuit court for a county has issued a judgment affecting a majority of the parents' children in common, then in the county of the circuit court that has issued the most recent judgment affecting a child of the same parents.

(C) The court may ~~consolidate actions~~ enter an order that consolidates the custody, parenting time, and support provisions of multiple orders administratively ~~without holding a consolidation hearing~~ when:

(1) the cases involve different children of the same parents but all other parties are the same, or

(2) more than one action involves the same child and parents.

The order must refer to the other cases and state that it supersedes the custody, parenting time, and support provisions of the orders in those cases.

~~(D) If a new action for support is filed in a circuit court in which a party has an existing or pending support obligation, the new case must be assigned to the same judge to whom the other case is assigned, pursuant to MCR 8.111(D).~~

~~(E)~~(D) In a case involving a dispute regarding the custody of a minor child, the court may, on motion of a party or on its own initiative, for good cause shown, appoint a guardian ad litem to represent the child and assess the costs and reasonable fees against the parties involved in full or in part.

Staff Comment: The proposed amendment would remove the requirement to file a new action as a supplemental complaint, which would allow trial courts to consolidate cases in a way that is more compatible with trial court case management systems.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2012, at P.O. Box 30052, Lansing, Ml 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2006-04. Your comments and the comments of others will be posted at www.courts.michigan.gov/supremecourt/Resources/Administrative/index.htm.

PROPOSED AMENDMENT OF MCR 3.210.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 3.210 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is indicated in strikeover.]

RULE 3.210. HEARINGS AND TRIALS.

(A) [Unchanged.]

(B) Default Cases.

(1) ~~Default cases are governed by MCR 2.603.~~ Application. This subrule applies to the entry of a default and a default judgment in all cases governed by this subchapter. See MCR 3.201(A)(1) and (2).

(a) If a default is requested for failure to plead or otherwise defend as provided by these rules, subrule (B)(2) applies.

(b) If a default is ordered as a sanction under other rules, the order shall specify what actions the sanctioned party is prohibited from taking, and all other rights provided by law and these rules remain unrestricted.

(c) A default establishes (i) the requesting party's right to relief, (ii) the truth of well-pled material facts, and (iii) entitles the requesting party to proceed to entry of a default judgment.

(2) ~~A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of the defendant because of failure to appear at the hearing or by consent. Every case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule~~. Entry of Default.

(a) A party may request the entry of a default of another party for failure to plead or otherwise defend. Upon presentation of an affidavit by a party asserting facts setting forth service and failure to plead or otherwise defend, the clerk must enter a default against the party.

(b) The party who requested entry of the default must provide prompt notice that the default has been entered to the defaulted party and all other parties and persons as provided by MCR 3.203, and file a proof of service.

(c) Once the default of a party has been entered, and before entry of the default judgment, that party may not file any pleadings, but may file a motion to set aside the default under subrule (B)(3).

(d) A party in default may appear in a case under this subchapter by filing an appearance or motion, or by participating in any scheduled court proceedings, referee hearings, mediations, arbitrations, or other ADR proceedings. A party who has appeared in a case under this subchapter must be served with a copy of every paper later filed in the case.

(e) If the default of a party has been entered for failure to plead or otherwise defend, that party may participate in all discovery as provided in Subchapter 2.300; may file motions; and is entitled to notice of and participation in all scheduled court proceedings, referee hearings, mediations, arbitrations, other ADR proceedings, friend of the court investigations, and trial.

(f) If a default is ordered as a sanction under other rules, the court may impose limitations on the defaulted party's right to participate in the action.

(3) ~~If a party is in default, proofs may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court.~~ Setting Aside Default. A default may be set aside, before the entry of the default judgment, upon verified motion of the defaulted party showing good cause, or that the court lacks jurisdiction over the defendant or over the subject matter.

(4) ~~If the court determines that the proposed judgment is inappropriate, the party who prepared it must, within 14 days, present a modified judgment in conformity with the court's opinion.~~ Notice of Hearing and Motion for Entry of Default Judgment.

(a) A party moving for default judgment must schedule a hearing and serve the motion, notice of hearing, and a copy of the proposed judgment upon the defaulted party at least 14 days before the hearing on entry of the default judgment, and promptly file a proof of service.

(b) Notice shall be served in the manner provided by MCR 3.203 or by any manner permitted by the court which is reasonably calculated to give the defaulted party actual notice of the proceedings and an opportunity to be heard.

(c) If the default is entered for failure to appear for a scheduled trial, notice under this subrule is not required.

(5) ~~If the court determines not to enter the judgment, the court must direct that the judgment fee be returned to the person who deposited it.~~ Entry of Default Judgment.

(a) A judgment of divorce, separate maintenance, or annulment may not be entered as a matter of course on the default of a party because of failure to appear at the hearing on entry of the requested default judgment, or by consent, and the case must be heard in open court on proofs taken, except as otherwise provided by statute or court rule.

(b) Proofs for a default judgment may not be taken unless the judgment fee has been deposited with the court clerk and the proposed judgment has been given to the court. Nonmilitary affidavits required by law must be filed before a default judgment is entered in cases in which the defendant has failed to appear. A default judgment may not be entered against a minor or an incompetent person unless the person is represented in the action by a conservator or other representative, except as otherwise provided by law.

(c) The moving party must present evidence sufficient to satisfy the court that the terms of the proposed judgment are in accordance with law. The court may consider relevant and material affidavits, testimony, documents, exhibits, or other evidence not otherwise admissible.

(d) In cases involving minor children, the court may take testimony and receive or consider relevant and material affidavits, testimony, documents, exhibits, or other evidence not otherwise admissible from either party, as necessary, to make findings concerning the award of custody, parenting time, and support of the children.

(e) If the court does not approve the proposed judgment, the party who prepared it must, within 14 days, submit a modified judgment in conformity with the court's ruling pursuant to MCR 2.602(B)(3), or as otherwise directed by the court.

(f) Upon entry of a default judgment, the moving party must serve a copy of the judgment as entered by the court on the defaulted party within 7 days after it has been entered, in accordance with MCR 3.203, and promptly file a proof of service.

(6) Setting Aside Default Judgment.

(a) A motion to set aside a default judgment, except when grounded on lack of jurisdiction over the defendant, lack of subject matter jurisdiction, failure to serve the notice of default as required by subrule (B)(2)(b), or failure to serve the proposed default judgment and notice of hearing for

the entry of the judgment under subrule (B)(4), shall be granted only if the motion is filed within 21 days after the default judgment was entered and if good cause is shown.

(b) In addition, the court may set aside a default judgment or modify the terms of the judgment in accordance with statute or MCR 2.612.

(7) Costs. An order setting aside the default or default judgment must be conditioned on the defaulted party paying the taxable costs incurred by the other party in reliance on the default or default judgment, except as prescribed in MCR 2.625(D). The order may also impose other conditions the court deems proper, including a reasonable attorney fee.

(C)-(D) [Unchanged.]

(E) Consent Judgment.

(1) A party, or all parties, may present to the court for entry a judgment approved as to form and consent and signed by all parties.

(2) If the court determines that the proposed consent judgment is not in accordance with law, the parties shall submit a modified consent judgment in conformity with the court's ruling within 14 days, or as otherwise directed by the court.

(3) Upon entry of a consent judgment, the moving party must serve a copy of the judgment as entered by the court on all other parties within 7 days after it has been entered, in accordance with MCR 3.203, and promptly file a proof of service.

Staff Comment: The proposed amendments of MCR 3.210 were submitted to this Court by the Michigan Judges Association after conclusion of its work and input from its Domestic Relations Committee. The proposal would govern the entry of default and default judgment in domestic relations cases and would cover and clarify related procedural issues. While this proposal adds provisions that may be found in Chapter 2 of the Michigan Court Rules, these proposed amendments of MCR 3.210 attempt to clarify procedures to be used in domestic relations cases. The proposed amendment of MCR 3.210 also would allow parties to reach agreement on issues related to property division, custody, parenting time, and support, and enter a consent judgment on those issues if the court approves it.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-32. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

PROPOSED ADOPTION OF NEW MCR 3.220.

On order of the Court, this is to advise that the Court is considering adoption of new Rule 3.220 of the Michigan Court Rules. Before deter-

mining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources/administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

RULE 3.220. DOMESTIC RELATIONS ARBITRATION.

(A) Applicability of Rule. This rule governs statutory Domestic Relations Arbitration under MCL 600.5070-600.5082.

(B) Unless specifically addressed in this rule, the provisions of MCR 3.602 govern arbitrations conducted under the Domestic Relations Arbitration Act.

(C) Deadline for Completion.

(1) Upon entry of the order for arbitration, the Court shall impose a deadline upon the arbitrator for presentment of a judgment of divorce or final order disposing of all matters submitted to the arbitrator.

(2) On a party's or the arbitrator's request for good cause, or on the Court's own initiative, the deadline may be extended by the Court. The deadline may not be extended absent an order of the Court.

(3) Either party may submit a proposed judgment or final order to the Court in accordance with the arbitration award(s). If the parties fail to present a judgment or final order by the deadline, it is the responsibility of the arbitrator to present a judgment of divorce or final order within 14 days following the expiration of the deadline. In the event a judgment or final order is not submitted by the arbitrator within 14 days following the expiration of the deadline, the Court may impose sanctions upon the arbitrator if it determines that the delay has not been caused by the parties. If the delay has been caused by the parties, the Court may impose sanctions on the party responsible.

(4) The judgment of divorce shall not be entered unless all matters set forth in MCR 3.211 are completed including the determination of property rights and until no further action by an arbitrator is necessary to effectuate any matters required under MCR 3.211.

(D) Return of Proceeding to Trial Court. In the event a proposed judgment is not submitted to the trial court in accordance with this rule, the matter shall be scheduled for trial before the trial court.

(E) Interim Arbitration Awards.

(1) To the extent an arbitrator issues interim awards before issuance of the final arbitration award, those awards shall clearly delineate that it is an interim award.

(2) Interim arbitration awards shall automatically become orders of the Court, unless a party submits a motion to correct errors or omissions with the arbitrator within 14 days as provided under MCL 600.5078. In the event a timely motion to correct errors or omissions is filed, the

interim order shall become an order of the Court upon the arbitrator's denial of that motion. In the event the motion is granted in whole or in part, the 14-day time period will reset only regarding those matters modified but the unchanged portions of the interim award shall automatically become orders of the Court.

(3) The arbitrator shall submit all interim awards to the Court in the form of an order for entry consistent with this rule.

Staff Comment: Proposed new MCR 3.220 would require the trial court judge to set a deadline for arbitration proceedings and approve any extensions of those time periods. Further, the proposed rule would allow arbitrators to issue interim awards during the arbitration proceeding.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-33. Your comments and the comments of others will be posted at www.courts.michigan.gov/supremecourt/Resources/Administrative/index.htm.

PROPOSED AMENDMENT OF RULE 5 OF THE RULES FOR THE BOARD OF LAW EXAMINERS.

On order of the Court, this is to advise that the Court is considering an amendment of Rule 5 of the Rules for the Board of Law Examiners. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter will be considered at a public hearing. The notices and agendas for public hearings are posted at http://courts.michigan.gov/supremecourt/Resources/Administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions are indicated by underlining and deletions are indicated by strikeover.]

RULE 5. ADMISSION WITHOUT EXAMINATION.

(A) An applicant for admission without examination must

(1) qualify under Rules 1 and 2(B);

(2) be licensed to practice law in the United States, its territories, or the District of Columbia;

(3) be a member in good standing of the Bar where admitted;

~~(4) intend in good faith to maintain an office in this state for the practice of law;~~

(~~5~~4) intend to practice law in Michigan, or to be a full-time instructor in a reputable and qualified Michigan law school; and

(~~6~~5) have, after being licensed and for 3 of the 5 years preceding the application,

(a) actively practiced law as a principal business or occupation in a jurisdiction where admitted (the practice of law under a special certificate pursuant to Rule 5[D] or as a special legal consultant pursuant to Rule 5[E] does not qualify as the practice of law required by this rule);

(b) been employed as a full-time instructor in a reputable and qualified law school in the United States, its districts, or its territories; or

(c) been on active duty (other than for training or reserve duty) in the United States armed forces as a judge advocate, legal specialist, or legal officer. The judge advocate general (or a comparable officer) or delegate must certify the assignment and the inclusive dates.

The Supreme Court may, for good cause, increase the 5-year period. Active duty in the United States armed forces not satisfying Rule 5(A)(6)(c) may be excluded when computing the 5-year period.

(B)-(E) [Unchanged.]

Staff Comment: This proposed amendment would eliminate the requirement that an applicant for admission by motion be required to express an intention to maintain an office in the state. Michigan is among a minority of states that requires that assertion, and maintaining this provision has resulted in at least one state rejecting the petition for admission of a Michigan lawyer because Michigan retains this type of requirement.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on this proposal may be sent to the Supreme Court Clerk in writing or electronically by April 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2010-31 Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

YOUNG, C.J. (*concurring*). The requirement that foreign attorneys seeking to practice law in Michigan must maintain a law office in Michigan is imposed by MCL 600.946. Rule 5 merely incorporates this statutory requirement into our rules so that it can easily be accessed by those petitioning to practice in this state. A member of the State Bar of Michigan has petitioned the Court to eliminate this requirement from Rule 5.[1] However,

[1] Significantly, the State Bar of Michigan itself has taken no formal position on the propriety of this petition to amend Rule 5. Since the bar has not formally endorsed this change, I believe publication of the proposed change is premature on this ground alone. I do not formally oppose publication because publication of a proposed amendment in no way obligates the Court to eventually approve it.

merely revising the rule would do nothing to remove the statutory requirement.

If the State Bar of Michigan supports the change, I encourage the bar to petition the Legislature and seek amendment of MCL 600.946. The proposed rule change can have no force or effect unless a legislative change is accomplished. I would be willing to consider support for the requested change to Rule 5, but not before the statute is amended.

Order Entered February 1, 2012:

PROPOSED AMENDMENTS OF MCR 5.801, 7.102, 7.103, 7.108 AND 7.109.

On order of the Court, this is to advise that the Court is considering amendments of Rules 5.801, 7.102, 7.103, 7.108 and Rule 7.109 of the Michigan Court Rules. Before determining whether the proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at www.courts.michigan.gov/supremecourt/resources administrative/ph.htm.

Publication of this proposal does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

[Additions to the text are indicated in underlining and deleted text is indicated in strikeover. The amendments in this proposal would amend the versions of MCR 7.102, 7.103, 7.108, and 7.109 adopted by the order of December 8, 2011, in ADM File No. 2010-19, 490 Mich clxii. The amendments adopted by that order become effective May 1, 2012.]

RULE 5.801. APPEALS ~~TO OTHER COURTS~~ FROM THE PROBATE COURT.

(A) ~~Right to Appeal. An interested person~~ General Provisions. A party to a civil action or an interested person in a proceeding aggrieved by an order of the probate court may appeal as provided by this rule.

(B) ~~Orders Appealable to Court of Appeals~~ Right to Appeal. ~~Orders appealable of right to the Court of Appeals are defined as and limited to the following:~~

~~(1)~~ ~~a~~A final order affecting the rights or interests of a party to a civil action

~~(2) a final order affecting the rights~~ or ~~interests of~~ an interested person in a proceeding in the probate court is appealable as a matter of right to the Court of Appeals. A probate court order is "final" if it qualifies as a final order under MCR 7.202(6)(a), or if it affects with finality the rights or interests of a party or an interested person in the subject matter. ~~involving a decedent estate, the estate of a person who has disappeared or is missing, a conservatorship or other protective proceeding, the estate of an individual with developmental disabilities, or an~~

~~inter vivos trust or a trust created under a will. These are defined as and limited to orders resolving the following matters:~~

~~(a) appointing or removing a personal representative, conservator, trustee, or trust protector as referred to in MCL 700.7103(n), or denying such an appointment or removal;~~

~~(b) admitting or denying to probate of a will, codicil, or other testamentary instrument;~~

~~(c) determining the validity of a governing instrument;~~

~~(d) interpreting or construing a testamentary instrument or inter vivos trust;~~

~~(e) approving or denying a settlement relating to a governing instrument;~~

~~(f) reforming, terminating, or modifying or denying the reformation , termination or modification of a trust;~~

~~(g) granting or denying a petition to consolidate or divide trusts;~~

~~(h) discharging or denying the discharge of a surety on a bond from further liability;~~

~~(i) allowing, disallowing, or denying a claim;~~

~~(j) assigning, selling, leasing, or encumbering any of the assets of an estate or trust;~~

~~(k) authorizing or denying the continuation of a business;~~

~~(l) determining special allowances in a decedent's estate such as a homestead allowance, an exempt property allowance, or a family allowance;~~

~~(m) authorizing or denying rights of election;~~

~~(n) determining heirs, devisees, or beneficiaries;~~

~~(o) determining title to or rights or interests in property;~~

~~(p) authorizing or denying partition of property;~~

~~(q) authorizing or denying specific performance;~~

~~(r) ascertaining survivorship of parties;~~

~~(s) granting or denying a petition to bar a mentally incompetent or minor wife from dower in the property of her living husband;~~

~~(t) granting or denying a petition to determine *cy pres;*~~

~~(u) directing or denying the making or repayment of distributions;~~

~~(v) determining or denying a constructive trust;~~

~~(w) determining or denying an oral contract relating to a will;~~

~~(x) allowing or disallowing an account, fees, or administration expenses;~~

~~(y) surcharging or refusing to surcharge a fiduciary or trust protector as referred to in MCL 700.7103(n);~~

~~(z) determining or directing payment or apportionment of taxes;\so~~

~~(aa) distributing proceeds recovered for wrongful death under MCL 600.2922;~~

~~(bb) assigning residue;~~

~~(cc) granting or denying a petition for instructions;~~

~~(dd) authorizing disclaimers.~~

~~(ee) allowing or disallowing a trustee to change the principal place of a trust's administration;~~

~~(3) other appeals as may be hereafter provided by statute.~~

(C) ~~Final Orders Appealable to Circuit Court. All final orders not enumerated in subrule (B) are appealable of right to the circuit court. These include, but are not limited to:~~

~~(1) a final order affecting the rights and interests of an adult or a minor in a guardianship proceeding;~~

~~(2) a final order affecting the rights or interests of a person under the Mental Health Code, except for a final order affecting the rights or interests of a person in the estate of an individual with developmental disabilities.~~

~~(D)~~ Interlocutory Orders. An interlocutory order, such as an order regarding discovery; ruling on evidence; appointing a guardian ad litem; or suspending a fiduciary for failure to give a new bond, to file an inventory, or to render an account, may be appealed only to the ~~circuit court~~ Court of Appeals and only by leave of that court. The ~~circuit court~~ Court of Appeals shall pay particular attention to an application for leave to appeal an interlocutory order if the probate court has certified that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the termination of the litigation.

~~(E) Transfer of Appeals From Court of Appeals to Circuit Court. If an appeal of right within the jurisdiction of the circuit court is filed in the Court of Appeals, the Court of Appeals may transfer the appeal to the circuit court, which shall hear the appeal as if it had been filed in the circuit court.~~

~~(F) Appeals to Court of Appeals on Certification by Probate Court. Instead of appealing to the circuit court, a party may appeal directly to the Court of Appeals if the probate court certifies that the order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an appeal directly to the Court of Appeals may materially advance the ultimate termination of the litigation. An appeal to the Court of Appeals under this subrule is by leave only under the provisions of MCR 7.205. In lieu of granting leave to appeal, the Court of Appeals may remand the appeal to the circuit court for consideration as on leave granted.~~

RULE 7.102. DEFINITIONS.

For purposes of this subchapter:

(1)-(8) [Unchanged.]

(9) "trial court" means the district~~, probate,~~ or municipal court from which the "appeal" is taken.

RULE 7.103. APPELLATE JURISDICTION OF THE CIRCUIT COURT.

(A) Appeal of Right. The circuit court has jurisdiction of an appeal of right filed by an aggrieved party from the following:

(1) a final judgment or final order of a district or municipal court, except a judgment based on a plea of guilty or nolo contendere;

~~(2) a final order of a probate court under MCR 5.801(C);~~

~~(3)~~(2) a final order or decision of an agency governed by the Administrative Procedures Act, MCL 24.201 *et seq.*; and

~~(4)~~(3) a final order or decision of an agency from which an appeal of right to the circuit court is provided by law.

(B) [Unchanged.]

RULE 7.108. STAY OF PROCEEDINGS; BOND; REVIEW.

(A)-(D) [Unchanged.]

~~(E) Probate Actions.~~

~~(1) The probate court has continuing jurisdiction to decide other matters pertaining to the proceeding from which an appeal was filed.~~

~~(2) A stay in an appeal from the probate court is governed by MCL 600.867 and MCR 5.802(C).~~

RULE 7.109. RECORD ON APPEAL.

(A) [Unchanged.]

(B) Transcript.

(1) *Appellant's Duties; Orders; Stipulations.*

(a) The appellant is responsible for securing the filing of the transcript as provided in this rule. Unless otherwise provided by circuit court order or this subrule, the appellant shall order the full transcript of testimony and other proceedings in the trial court or agency. Under MCR 7.104(D)(2), a party must serve a copy of any request for transcript preparation on the opposing party and file a copy with the circuit court.

(b) ~~In an appeal from probate court, only that portion of the transcript concerning the order appealed need be filed. The appellee may file additional portions of the transcript.~~

~~(c)~~ On the appellant's motion, with notice to the appellee, the trial court or agency may order that no transcript or some portion less than the full transcript be included in the record on appeal. The motion must be filed within the time required for filing an appeal, and, if the motion is granted, the appellee may file any portions of the transcript omitted by the appellant.

~~(d)~~(c) The parties may stipulate that no transcript or some portion less than the full transcript be filed.

~~(e)~~(d) The parties may agree on a statement of facts without procuring the transcript and the statement signed by the parties may be filed with the trial court or agency and sent as the record of testimony in the action.

(2)-(3) [Unchanged.]

(C)-(I) [Unchanged.]

Staff Comment: The proposed amendments were submitted to this Court by the State Bar of Michigan Probate and Estate Planning Section in conjunction with the Michigan Judges Association, Michigan Probate Judges Association, and the Michigan Court of Appeals. The proposed changes would direct that all appeals from probate court be considered by the Court of Appeals instead of some orders being appealed to the Court of Appeals and other orders being appealed to the circuit court.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on the proposal may be sent to the Supreme Court Clerk in writing or electronically by May 1, 2012, at P.O. Box 30052, Lansing, MI 48909, or MSC_clerk@courts.mi.gov. When filing a comment, please refer to ADM File No. 2011-30. Your comments and the comments of others will be posted at www.courts.mi.gov/supremecourt/resources/administrative/index.htm.

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1. A public-service provider may not be held vicariously liable under the Civil Rights Act for quid pro quo sexual harassment affecting public services on the basis of unforeseeable criminal acts that its employee committed outside the scope of his or her employment; an act is considered within the scope of employment if the employee was engaged in the employer's service and accomplished the act in furtherance or in the interest of the employer's business, but not within the scope of employment if the employee acted independently and solely to further the employee's individual interests; an act is foreseeable if the employer had actual or constructive knowledge of prior similar conduct and actual or constructive knowledge of the employee's propensity to act in accordance with that conduct; if the conduct at issue occurred close in time to prior similar conduct, an employer's knowledge of that prior conduct may give rise to a valid inference that the conduct was foreseeable, whereas if an employee's actions were temporally distant and the employee's recent record suggested a change in character, foreseeability would not be established (MCL 37.2103[i]). *Hamed v Wayne County*, 490 Mich 1.

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1. *People v Armstrong*, 490 Mich 281.

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2. Reducing or eliminating the statutory tax exemption for public-pension incomes does not violate the constitutional provision that prohibits the state and its political subdivisions from diminishing or impairing the accrued financial benefits of their pension plans and retirement systems (Const 1963, art 9, § 24; MCL 206.30; 2011 PA 38). *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295.
3. Reducing or eliminating the statutory tax exemption for public-pension incomes does not violate the constitutional prohibition of laws that impair contractual obligations (US

Const, art I, § 10[1]; Const 1963, art 1, § 10; MCL 206.30; 2011 PA 38). *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295.

4. Determining eligibility for income-tax exemptions on the basis of a taxpayer's date of birth does not violate the equal protection of the law (US Const, Am XIV; Const 1963, art 1, § 2; MCL 206.30[9]; 2011 PA 38). *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295.
5. Determining eligibility for income-tax exemptions and deductions on the basis of a taxpayer's total household resources or age and total household resources violates the constitutional prohibition of imposing an income tax that is graduated as to rate or base (Const 1963, art 9, § 7; MCL 206.30[7], 206.30[9]; 2011 PA 38). *In re Request for Advisory Opinion Regarding Constitutionality of 2011 PA 38*, 490 Mich 295.

CONTRACTS CLAUSE—*See*

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GOVERNMENTAL IMMUNITY

HIGHWAY EXCEPTION

1. Bridges, sidewalks, trailways, crosswalks, and culverts

are included within the definition of "highway" for purposes of the highway exception to governmental immunity only if they are "on the highway" (MCL 691.1401[e], 691.1402[1]). *Duffy v Dep't of Natural Resources*, 490 Mich 198.

2. "Trailway," as used in the highway exception to governmental immunity, should be construed according to the definition of "trailway" provided in the trailways act (part of the Natural Resources and Environmental Protection Act), which defines "trailway" as a land corridor that features a broad trail capable of accommodating a variety of public recreation uses (MCL 324.72101[k], 691.1401[e], 691.1402[1]). *Duffy v Dep't of Natural Resources*, 490 Mich 198.

GRADUATED INCOME TAX—*See*

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INSURANCE

NO-FAULT

1. A plaintiff seeking reimbursement from a no-fault insurance carrier for a medical treatment that is experimental and not generally accepted within the medical community must present objective and verifiable medical evidence through expert testimony that the treatment is efficacious in his or her care, recovery, or rehabilitation; if the plaintiff has provided this evidence and the trial court has ensured that it is reliable, the finder of fact may determine whether the treatment was

reasonably necessary by considering such factors as the severity and chronicity of the condition, the outcome of any previous treatment, the likelihood that alternative treatments would be efficacious, a personal physician's recommendation in conjunction with the patient's preference, and the short-term and long-term risks and benefits of the treatment (MCL 500.3107[1]; MRE 702). *Krohn v Home-Owners Ins Co*, 490 Mich 145.

2. An insurer may be required to pay personal protection insurance benefits under the no-fault act for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if the injury was a direct result of physical contact with equipment permanently mounted on the vehicle while the equipment was being operated or used; the constituent parts of a vehicle itself, such as the doors, are not equipment for purposes of this provision (MCL 500.3106[1][b]). *Frazier v Allstate Ins Co*, 490 Mich 381.
3. An insurer may be required to pay personal protection insurance benefits under the no-fault act for accidental bodily injury arising out of the ownership, operation, maintenance, or use of a parked vehicle as a motor vehicle if the person sustained the injury while occupying, entering into, or alighting from the vehicle; alighting does not occur in a single moment but occurs as the result of a process that begins when a person initiates the descent from a vehicle and is completed when the person has effectively descended from the vehicle and come to rest, that is, when one has successfully transferred full control of one's movement from reliance on the vehicle to one's body; alighting is typically accomplished when both feet are planted firmly on the ground (MCL 500.3106[1][c]). *Frazier v Allstate Ins Co*, 490 Mich 381.

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MISCONDUCT OF JUDGES

1. *In re Justin*, 490 Mich 394.

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LIMITATION OF ACTIONS

MEDICAL MALPRACTICE

1. A plaintiff in a medical malpractice action is not allowed to

amend his or her original notice of intent to bring the action to add a nonparty defendant so that the amended notice relates back to the original filing for purposes of tolling the statutory period of limitations; the period of limitations will not be tolled if the plaintiff fails to provide a notice of intent to a potential defendant within the applicable period of limitations. *Driver v Naini*, 490 Mich 239.

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MEDICAL MALPRACTICE

1. A medical malpractice plaintiff's failure to file a timely affidavit of merit that satisfies the statutory requirements generally results in dismissal of the case; the dismissal must be without prejudice unless other grounds for dismissal exist, such as the expiration of the limitations period (MCL 600.2912d[1]). *Ligons v Crittenton Hospital*, 490 Mich 61.
2. A court may amend any process or proceeding for the furtherance of justice, but an affidavit of merit in a medical malpractice case is neither a process nor a proceeding and, thus, may not be amended as such (MCL 600.2301). *Ligons v Crittenton Hospital*, 490 Mich 61.
3. A statement that the alleged malpractice caused the injury is insufficient to satisfy the statutory requirement that the plaintiff's affidavit of merit in a medical malpractice action state "the manner in which" the breach of the standard of practice or care was the proximate cause of the injury (MCL 600.2912d[1][d]). *Ligons v Crittenton Hospital*, 490 Mich 61.

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